IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL JOSIAH CARUSO, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT, Respondent.	Supreme Court Case No.: District Court Case No.: C-19-345393-1

APPENDIX TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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A. Order denying Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers Under the Nevada Constitution (SC_0001-0002);

B. Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers Under the Nevada Constitution (SC_0003-0019);

C. State's Opposition to Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers Under the Nevada Constitution (SC_0020-0065);

D. Reply in Support of Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers Under the Nevada Constitution (SC_0066-0072);

E. *State v. Plumlee*, C-20-346852-A, Order Granting Appellant's Motion to Reconsider, Granting the Appeal, Reversing Conviction, and Remanding to Lower Court (SC_0073-0079);

F. *State v. Plumlee*, C-20-346852-A, Order Denying Respondent's Motion for Clarification and Stay of the Proceedings (SC_0080-0082).

DATED this 20th day of January 2021.

HAMILTON LAW

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of HAMILTON LAW, LLC, and that on this 20th day of January 2021, **APPENDIX TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS** was served via the court's electronic filing system to the following persons:

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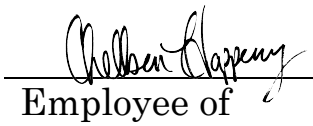

Employee of
Hamilton Law, LLC

Exhibit A

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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL CARUSO
#3003640

Defendant.

CASE NO: C-19-345393-1

DEPT NO: V

ORDER DENYING DEFENDANT'S MOTION TO DISMISS CASE AND EXCLUDE EVIDENCE FOR DISTRICT ATTORNEY'S VIOLATION OF THE SEPARATION OF POWERS UNDER THE NEVADA CONSTITUTION

This matter came before the Court on the Defendant's Motion to Dismiss Case and Exclude Evidence. The Court, having reviewed the papers submitted by the defendant and the Opposition from the State, not requiring oral arguments of the parties, and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED that the Motion is DENIED for the reasons and arguments stated in the State's Opposition.

Dated this 22nd day of December, 2020

76A AB8 7936 D04A
Carolyn Ellsworth
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-19-345393-1
vs	DEPT. NO. Department 5
Samuel Caruso	

AUTOMATED CERTIFICATE OF SERVICE

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Samuel Josiah Caruso

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. SAMUEL JOSIAH CARUSO #3003640, Defendant(s).	Case No: C-19-345393-1 Dept. No.: V **(HEARING REQUESTED)** **Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution**

COMES NOW, the Defendant, SAMUEL JOSIAH CARUSO ("Samuel"), by and through his counsel, Ryan A. Hamilton, Esq., and hereby files this *Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution*. This Motion is made and based upon all the papers and pleadings on file herein.

DATED this 2nd day of December 2020.

HAMILTON LAW

By: _____
RYAN A. HAMILTON, ESQ.

NOTICE OF HEARING

TO: THE STATE OF NEVADA, Plaintiff; and

TO: THE DISTRICT ATTORNEY'S OFFICE:

PLEASE TAKE NOTICE that undersigned counsel will bring the Defendant's *Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution* on for hearing before the above entitled court on the _____ day of _____, 20___, at _____ _.m. or as soon thereafter as counsel can be heard.

DATED this 2nd day of December 2020.

Respectfully submitted,

By: _____

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POINTS AND AUTHORITIES

Deputy District Attorney Scheible's prosecution of Defendant in this case violates Nevada's Constitution concerning the separation of powers. *See* list of current legislators at https://www.leg.state.nv.us/App/Legislator/A/Senate/. DA Scheible is also a Senator in the Nevada State Legislature. Article 3, section 1 of the Nevada Constitution provides in relevant part:

> 1. The powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Nev. Const. art. III, § 1. Recently, another District Court reversed a defendant's DUI conviction based on the State's violation of the Separation of Powers. *See* ***Ex. A****, Order reversing conviction, State v. Plumlee*, Case No. C-20-346852-A, Dept. II, Eight Judicial District Court, Clark County, Nevada. In *Plumlee*, the Court held that the plain language of the Nevada Constitution forbids members of the legislative branch, such as senators, from simultaneously serving as prosecutors who are vested with power to enforce the laws as members of the executive branch. *Id.* at 2. Because DA Scheible did not have the legal authority under the Nevada Constitution, the

Court held that the defendant's conviction was a legal nullity, having no force or effect. *Id.* at 3.

There is no question that DA Scheible, serving simultaneously as a prosecutor and senator, is exercising both legislative and executive power. In *Del Papa v. Steffen*, 112 Nev. 369, 377, 915 P.2d 245, 250 (Nev. 1996), the Nevada Supreme Court explained that "legislative power is the power of law-making representative bodies to frame and enact laws, and to amend and repeal them… [and] [t]he executive power extends to the carrying out and enforcing the laws enacted by the legislature…."

In *Steffen*, the Nevada Supreme Court held that certain Justices violated the Separation of Powers where they initiated an investigation to expose sources of improper news leaks to the media. *Id.* at 369, 246-7. The Justices' investigation into potentially criminal behavior was an improper exercise of executive power that the Nevada Constitution vests in the executive branch. *Id.* at 251, 378.

In *State v. Second Judicial Dist. Court in & for Cty. of Washoe*, 134 Nev. 783, 790, 432 P.3d 154, 160–61 (Nev. 2018), the Nevada Supreme Court held a statute unconstitutional for violating the separation of powers where the statute granted the District Attorney veto power over a court's sentencing decision to send a defendant to the veterans court program. There, the Supreme Court explained that Nevada's constitution goes even further than

the federal constitution's separation of powers in that the Nevada constitution "expressly prohibits any one branch of government from impinging on the functions of another." *Id.* at 786, 158 (quoting *Comm'n on Ethics v. Hardy,* 125 Nev. 285, 292, 212 P.3d 1098, 1103 (Nev. 2009)).

The Nevada Supreme Court time and again has made clear that the separation of powers is fundamental to our system of constitutional democracy. *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1219, 14 P.3d 1275, 1279 (Nev. 2000). Each branch serves as a check against the power of the others, preventing too much power being concentrated in any one branch. *See id.* For this constitutional structure to function properly, each branch must be allowed to operate independently. *Id.* "The division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people. *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (Nev. 1967)(holding statute requiring District Judge to determine qualifications of minister in awarding or denying certificate to perform marriages was unconstitutional because it imposed nonjudicial powers on District Court judges).

Each branch of government possesses inherent and incidental powers deemed "ministerial functions." *Id.* at 21, 242. Ministerial functions allow each branch to accomplish its basic function so that the branches can function in a coordinated, interdependent fashion. *Id.* Through ministerial

functions the powers of one branch may at times appear to overlap with those of another. *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 363, 302 P.3d 1118, 1128–29 (Nev. 2013). Where any duplication of authority can be traced back to a branch's "essential functions and basic source of power, the overlapping may be valid, but it is essential to the balance of powers that each branch is careful not to impinge on the authority of the other two branches, even in a small and seemingly harmless manner." *Id.*

Applying these principles to the case at hand, there is no question the State, through DA Scheible, is improperly exercising both legislative and executive functions simultaneously. Serving as a state senator who makes laws is a quintessential legislative function; serving as a prosecutor is a quintessential executive function. Judge Scotti in *Plumlee* concluded it constituted a violation of procedural due process of "nearly the highest order for a person to be tried and convicted by a public official…in charge of both writing and enforcing the law." **Ex. A**, *Plumlee*, at p. 3.

The State has prosecuted Samuel without the proper authority. What is more, the State kept Samuel in pre-trial detention for months without lawful authority and in violation of the separation-of-powers clause. Even today the State continues restricting Samuel's movements, confining him to house arrest, without any lawful authority. This case must be dismissed

immediately as a violation of the separation of powers, an unconstitutional exercise of executive power, and a legal nullity.

Moreover, the fruits of this unconstitutional exercise of executive power should not be used against Samuel. In this case, the State has violated Samuel's fundamental constitutional rights to procedural due process and his guarantees under Nevada's separation-of-powers clause. The exclusionary rule applies to evidence obtained in violation of a defendant's fundamental constitutional rights. *Garcia v. State*, 117 Nev. 124, 127–28, 17 P.3d 994, 996 (Nev. 2001)(explaining history of the exclusionary rule and its purpose as being "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it")(internal quotation omitted). The Court should exclude any evidence the State obtained against Samuel in bringing this improper prosecution. Further, the State should be precluded from using such evidence in the future should it seek to bring charges against Samuel again, after the dismissal of the instant case. Finally, any evidence the State obtained before filing charges against Samuel should also be excluded to the extent such evidence was obtained pursuant to a criminal investigation that violated the separation-of-powers clause.

WHEREFORE, Samuel respectfully requests that this Court order:

1. That all evidence obtained against him in this case be excluded as a

remedy for the violation of his constitutional rights;

2. That any evidence obtained in a criminal investigation (before the filing of the criminal complaint) be excluded to the extent the investigation violated the separation-of-powers clause;

3. That this case be dismissed as a legal nullity because it involves an improper and unconstitutional use of executive power; and

4. For all other just and proper relief.

DATED this 2nd day of December 2020.

HAMILTON LAW

By:/s/Ryan A. Hamilton
RYAN A. HAMILTON, ESQ.
Attorney for Defendant

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of HAMILTON LAW, LLC, and that on this 2nd day of December, **Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution** was served via the court's electronic filing system to the following persons:

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Employee of
Hamilton Law, LLC

Exhibit A

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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER LYNN PLUMLEE,

Appellant(s),

vs.

STATE OF NEVADA,

Respondent(s).

Case No.: C-20-346852-A
Dept. No.: II

Henderson JC Case No.: 18MH0263X
18CRH002333-0000

Hearing Date: October 15, 2020
Hearing Time: 10:00 a.m.

ORDER:
GRANTING APPELLANT'S MOTION TO RECONSIDER, GRANTING THE APPEAL, REVERSING CONVICTION, AND REMANDING TO LOWER COURT

PROCEDURAL HISTORY

This matter came before the Court on a Motion to Reconsider this Court's July 16, 2020 decision, Denying Appellant's Appeal. On February 11, 2020, Appellant filed her Notice of Appeal. After several continuances, and various other logistical issues, a hearing was held on July 9, 2020. This Court issued it ruling, denying the appeal, via Minute Order on July 16, 2020. Appellant timely filed a Motion to Reconsider, whereby she asserted newly discovered facts that Deputy District Attorney Melanie Scheible serves on the Nevada State Legislature, in violation of the Separation of Powers Doctrine[1].

On August 24, 2020, the Court held a Hearing and entertained arguments on Appellant's motion. Given the gravity of Appellant's assertions—and its potential widespread effects on others, like Scheible, who arguably hold dual governmental positions—the Court continued the hearing and allowed the parties an opportunity to provide supplemental briefing on the issue.

[1] This argument was also made by Appellant Molen, in case C-20-348754-A (Molen v. State), who is represented by the same counsel as Ms. Plumlee; with Deputy District Attorney Scheible similarly representing the State. Accordingly, the Court *quasi*-consolidated the cases, solely for the purpose of arguing the Separation of Powers issue.

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

After reviewing all of the submitted papers and pleadings, and considering all of the arguments and authority presented, the Court GRANTS Appellant's Motion to Reconsider, based on the violation of Appellant's Constitutional rights to procedural due process, as explained below.

DISCUSSION

Appellant Jennifer Plumlee was deprived of her Constitutional rights of procedural due process because her prosecutor, Deputy District Attorney Scheible, also served as a Legislator at the time of the trial, in violation of the "Separation of Powers" doctrine – which doctrine exists as a fundamental feature of American government, and as an express clause in the Nevada Constitution. Nev. Const. Art III, §1. An individual may not serve simultaneously as the lawmaker and the law-enforcer of the laws of the State of Nevada.

The plain and unambiguous language of the Nevada Constitution is that:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislative, - the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this Constitution.

Nev. Const. Art III, §1. This is commonly known as the "Separation of Powers" clause.

It is undisputed that Prosecutor Scheible was a person charged with the exercise of powers within the legislative branch of government at the time of the trial. Further, there is no reasonable dispute that, as prosecutor, she was charged with the exercise of powers within the executive branch. The enforcement of the laws of the State of Nevada are powers that fall within the executive branch of the government of the State of Nevada. See Nev. Const. Art. V, §7. Prosecutor Scheible was enforcing the laws of the State of Nevada, and representing the State of Nevada, and thus was exercising the powers delegated to her within the executive branch.

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Deputy District Attorney Scheible did not have the legal authority to prosecute Appellant, thus the trial was a nullity.

The Separation of Powers doctrine historically exists to protect one branch of government from encroaching upon the authority of another. However, more than that, it exists to safeguard the people against tyranny – the tyranny that arises where all authority is vested into one autocrat – a person who writes the law, enforces the law, and punishes for violations of the law.

Our Founding Fathers understood that consolidated power was the genesis of despotism. A dispersion of power, they understood, was the best safeguard of liberty. As explained by James Madison, "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47, ¶3.

One who serves in the legislative branch in making the law must not and cannot simultaneously serve in the executive branch as a prosecutor of the State laws. This Court finds that it is a violation of procedural due process of nearly the highest order for a person to be tried and convicted by a public official who in charge of both writing and enforcing the law.

The authorities cited by the State are very clearly wrong and distinguishable.

In 2004, Attorney General (AG) Brian Sandoval issued an opinion that local executive branch employees are not prohibited from serving in the legislature. However, that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

In August 8, 2020, the Legislative Counsel Bureau issued an opinion that "local governments and their officers and employees are not part of one of the three departments of state government." However, similar to the AG Opinion mentioned above, that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

The State's reliance on Lane v. District Court, 760 P.2d 1245 (Nev. 1988) is misplaced. The issue in Lane was whether the Judiciary was improperly interfering with the functions of the executive branch. The Nevada Supreme Court did not squarely reach the issue whether the due process rights of a criminal defendant were violated when prosecuted by an Assistant District Attorney who also served in the Legislature. Here, this Court is not directing the Office of the District Attorney to do or not to do anything. Rather, this Court is protecting the rights of the accused.

The State attempts to draw a distinction between a "public officer" and a "mere public employee." As to the former, the State acknowledges that the Separation of Powers Doctrine does apply to a person holding an Office established by the Constitution. However, the State invents out of thin air the notion that the Doctrine does not apply to an employee who carries out executive functions. The State's purported authority, State ex rel. Mathews v. Murray, 70 Nev. 116 (1953) does not stand for its proposition. Mathews merely held that a petition for Writ of *Quo Warranto* could not be used to remove a "public employee," – only a "public officer." While there might be a meaningful distinction between a public employee and public officer in some situations, it is not evidence in the words of the Nevada Separation of Powers doctrine.

The State wrongly relies on Heller v. Legislature of the State of Nevada, 120 Nev. 456 (2008) which held that the judiciary could not determine whether a legislator must be removed for violating the "Separation of Powers" doctrine where the legislator also served in the executive Branch. That case was based on lack of standing, rather than the merits. Further, this is not a case of the Judiciary determining the qualifications to be a member of the Legislature, or to work for the District Attorneys' office. Rather this case involves the due process rights of an accused; and, in this case, those rights were violated.

The Appellant was deprived of her constitutional rights to procedural due process even if the Nevada Separation of Powers clause as written does not apply to any persons employed

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

by local governments. The "Separation of Powers" doctrine is such a clear, vital, and well-recognized aspect of the American system of government, existing long before the adoption of the Nevada Constitution.

CONCLUSION

This Court finds that it is fundamental to American jurisprudence that a person who is simultaneously the lawmaker and the law-enforcer of the laws of the State of Nevada shall not prosecute a criminal defendant.

The Court finds that Appellant did not waive her right on appeal to raise the issue of separation of powers. Raising it in the Motion for Reconsideration is the same as raising it in the original appeal brief as the initial appeal is still pending.

Accordingly, the Court hereby **ORDERS, ADJUDGES, AND DECREES** that Appellant's Motion to Reconsider is **GRANTED**.

The Court **FURTHER ORDERS** that Appellant's Appeal is **GRANTED**, the lower court's conviction is **REVERSED**, and the bond, if any, released to Appellant.

The Court **FURTHER ORDERS** that this matter be **REMANDED** to the lower court for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ___ day of November, 2020.

Dated this 18th day of November, 2020

RICHARD F. SCOTTI
DISTRICT COURT JUDGE
D1A 0D9 4066 2CAA
C-20-346852-A
Richard F. Scotti
District Court Judge

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

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Attorney(s) for Appellant(s)

Steven B. Wolfson, Esq.
Melanie L. Scheible, Esq.
Alexander G. Chen, Esq.
District Attorney(s)

/s/ *Melody Howard*
_____
Melody Howard
Judicial Executive Assistant
C-20-346852-A

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jennifer Lynn Plumlee, Appellant(s) vs Nevada State of, Respondent(s)	CASE NO: C-20-346852-A DEPT. NO. Department 2

AUTOMATED CERTIFICATE OF SERVICE

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Exhibit C

OPPS
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

SAMUEL JOSIAH CARUSO, #3003640

Defendant.

CASE NO: C-19-345393-1

DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS CASE AND EXCLUDE EVIDENCE FOR DISTRICT ATTORNEY'S VIOLATION OF THE SEPARATION OF POWERS UNDER THE NEVADA CONSTITUTION

DATE OF HEARING: DECEMBER 16, 2020
TIME OF HEARING: 10:15 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Opposition to Defendant's Motion.

This Supplement is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Defendant Samuel Caruso was initially charged by way of Criminal Complaint in the Henderson Justice Court Department 3. He was charged for acts committed between June 22, 2019 and August 14, 2019. His charges were for 7 counts of Sexual Assault, 2 counts of Open or Gross Lewdness, and 1 count of Burglary. A preliminary hearing was held on December 9, 2019. Defendant was represented by Ryan Hamilton, Esq., and the State was represented by Deputy District Attorneys Melanie Scheible and Ekaterina Derjavina. Following the preliminary hearing, Defendant was held to answer all the charges in the Criminal Complaint and the matter was bound over to district court.

Defendant filed a Motion for Bail Reduction or own recognizance release which was entertained on August 17, 2020, which was granted in part. Defendant was released on High Level Electronic Monitoring. Defendant then filed a Motion to Sever the counts as they pertained to two separate victims, and that matter was granted on October 8, 2020.

On December 2, 2020, Defendant filed the instant motion to dismiss and exclude evidence. The State now responds.

STATEMENT OF THE FACTS

On June 21, 2019, 16-year-old R.R. spent the day with her friends, going to a movie, The M Resort, and to a friend's house (identified as A.J.) in the evening. Preliminary Hearing Transcript 12/9/19 ("PHT") at 6-7. R.R. and her friends got back to A.J.'s house around midnight, where R.R. met Defendant for the first time. Id at 6, 9, 18. R.R. and her friends consumed alcohol with Defendant and R.R. became so intoxicated that she vomited. Id. Eventually she went to sleep around 4 A.M. on a couch in the living room with her boyfriend. Id at 9. Still under the influence of alcohol, R.R. was roused from her sleep by someone touching her breasts early in the morning hours of June 22. Id at 10-11, 19. At first, R.R. thought it was her boyfriend, but when she realized she could hear her boyfriend breathing next to her, she knew it had to be someone else. Id. R.R. testified at preliminary hearing that she was terrified and her fight, flight, or freeze responses kicked in and she froze. Id at 19.

Defendant started to touch R.R.'s buttocks and continued to fondle her breasts underneath her clothes as R.R. lay frozen in fear. Id at 12-13. Defendant moved his hands down to R.R.'s shorts and began touching her genital area under her shorts, but over her panties. Id. Defendant then moved R.R.'s panties aside and inserted his finger into her vagina. Id at 13. He placed his mouth over her genitals and moved his tongue over R.R.'s vulva. Id at 14.

Defendant briefly left as R.R. continued to lie frozen on the ottoman next to the couch Id at 15. When Defendant came back, he placed R.R.'s left hand on his penis and tried to wrap her fingers around it, but her hand was completely limp. Id. R.R. could feel a condom on Defendant's penis. Id. When R.R. would not grab Defendant's penis, he again, moved her shorts and panties out of the way and placed his mouth on her genitals, attempting to perform oral sex on her. Id at 16. He then tried to insert his penis in her vagina. Id. For about 30 seconds, with the condom on and R.R.'s vagina still dry he pressed his penis against her vulva. Id. Defendant then stood up and walked towards the other side of the ottoman where he forced his penis into R.R.'s mouth. Id at 17.

Weeks later, on August 14, 2019, Defendant was working as an Uber driver. Id at 51-52. He encountered a young woman with initial L.R. when her friends ordered an uber to take L.R. back to their hotel because she was intoxicated. Id at 47. Defendant drove L.R. to the Hard Rock Hotel where she was staying and entered the hotel with her. Id at 53. He rode the elevator with the intoxicated victim and followed her to her hotel room. Id. Once inside, he pushed L.R. onto a bed and pulled her pants off. Id at 37. He removed a tampon from L.R.'s vagina. Id. L.R. remembers her body being moved and experiencing pain while saying "stop" and "I don't want to." Id. When L.R. was awakened by her friends entering the room around 6AM, she continued to experience pain in her anus, as well as a general sense of uneasiness. Id at 38. Unsure of whether she had been attacked or had a terrible dream, she talked to her friends about what she could recall of the incident, and they recognized the man she described as the driver of the Uber. Id at 40-41. L.R. also identified Defendant in open court. Id at 40.

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ARGUMENT

I. HOLDING A POSITION ON THE LEGISLATURE AND BEING A DEPUTY DISTRICT ATTORNEY DOES NOT VIOLATE THE SEPARATION OF POWERS IN ARTICLE 3 § 1 OF THE NEVADA CONSTITUTION

Defendant claims that by holding a seat on the Legislature, a Deputy District Attorney is violating the separation of powers clause in the Nevada Constitution. This is false on numerous grounds. According to Article 3, § 1, sets out the three separate departments of government: the Legislative, the Executive, and the Judicial bodies. However, an acting Deputy District Attorney is a public employee rather than a person merely holding a public office, and thus the separation of powers does not apply. Article 4, § 6 grants in each House the authority to determine the qualifications of its own members. Clearly, the Senate in Nevada has not enacted any law or prohibition of a public employee also serving as a member of the Legislature.

The Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of public employment with the local government. Further it is relevant to point out that a Deputy District Attorney is a mere "public employee" and not a "public officer" as used in the Nevada Constitution. *See State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 984 (1953). Public officers are created by law not simply created by mere administrative authority and discretion. Second, the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. *Univ. & Cmty. Coll. Sys. V. DR Partners*, 117 Nev. 195 200-06. Since a Deputy District Attorney is a "public employee," the separation of powers doctrine as listed in Article 3 §1 is not applicable.

The general premise behind the separation of powers doctrine is to prevent one branch of government from encroaching on the powers of another branch. *Clinton v. Jones*, 520 U.S. 681, 699 (1976). This Court has previously considered what constitutes legislative, executive, and judicial powers: "Legislative power is the power of law-making representative bodies to

frame and enact laws, and to amend and repeal them...The executive power extends to the carrying out and enforcing the laws enacted by the legislature...'Judicial Power'...is the authority to hear and determine justiciable controversies. Judicial power includes the authority to enforce any valid judgment, decree, or order." *Galloway v. Truesdell*, 83 Nev. 13, 19 (1967).

With the separate bodies of government in mind, the Nevada Constitution does place certain specified limitations on its membership. Article 4 § 4 states that Senators shall be chosen from the qualified electors of their respective districts and that no Senator shall serve more than 12 years. Article 4 § 6 grants each House the authority to determine the qualifications of its own members. Article 4 § 8 specifically prohibits a member of the Legislature from accepting an appointment to a civil office of profit while serving. Article 4 § 9 makes certain federal officers ineligible for serving in the Legislature. Clearly, of all the restrictions and qualifications set forth in the Nevada Constitution, there is no limitation that constitutionally prohibits a legislator that works as an employee for an executive agency.

Under Nevada's Constitution, the legislature is also responsible for establishing certain county officers, including the District Attorney's Office. Article 4 § 32. As required by the Constitution, NRS Chapter 252 was the legislature's conveyance of policymaking authority on the principal prosecutor. NRS 252.070 is the legislative enactment that allows the district attorney to appoint deputy district attorneys that work under the elected district attorney. Notably, NRS 252.070(1) explicitly states, "The appointment of a deputy district attorney must not be construed to confer upon that deputy policymaking authority for the office of the district attorney or the county by which the deputy district attorney is employed." NRS 252.070(1) makes it clear that a deputy district attorney only serves under the district attorney, and does not hold a public office by virtue of prosecuting cases.

Not only does NRS 252.070 indicate there is a difference between the elected district attorney and a mere deputy, but other cases have indicated the legal difference as well. For instance in *Price v. Goldman*, this Court made it clear that deputy district attorneys do not have the authority to authorize wire intercepts. 90 Nev. 299, 301 (1974). Relying upon the

specific enumerated reasons, the Nevada Supreme Court agreed that 'district attorney' is not synonymous with everyone that works for the district attorney.

The Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of public employment with the local government. The Nevada Supreme Court has previously made the distinction between a public officer (i.e. the district attorney) and the district attorney's employees. "A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government." *State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21 (1953). Second, the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. *Univ. & Cmty. Coll. Sys. V. DR Partners*, 117 Nev. 195, 200-06. Since a Deputy District Attorney is only a "public employee," the separation of powers doctrine as listed in Article 3 §1 is not applicable.

Specifically, for district attorneys the Nevada Supreme Court has held that the separation of powers was not applicable to the exercise of certain powers by a county's District Attorney because he was not a state constitutional officer. *Lane v. Second Jud. Dist. Ct.* 104 Nev. 427, 437 (1988). In citing NRS 252.110, which sets forth the powers inured to the district attorney, the Court indicated that the district attorney is not an office created via the Nevada State Constitution, thus the separation of powers doctrine is inapplicable.

In 2004, then Secretary of State Dean Heller also broached this topic in two different ways. First, he sought an advisory opinion from the Nevada Attorney General on whether the separation of powers clause of the Nevada Constitution was applicable to local governments. 2004 Nev. Op. Atty. Gen. No. 03 (Nev.A.G.), 2004 WL 723329. While Attorney General Opinions are not binding, they may provide persuasive authority to public officials. *Clark County Office of Coroner/Medical Examiner v. Las Vegas Review-Journal*, 136 Nev. 44 (2020). Attorney General Brian Sandoval issued his opinion that local government employees could dually serve as members of the Nevada Legislature, and that such service did not violate Article 3, § 1 of the Nevada Constitution's separation of powers clause.

Attorney General Sandoval went on to explain Nevada's "long-standing practice of local government employees serving in the Nevada State Legislature." He pointed to examples such as Assemblywoman Ruth Averill, who was the second woman ever elected to the Nevada State Legislature. Assemblywoman Averill was a school teacher that went on to serve on the Assembly Committee on Judiciary as well as the Assembly Committee on Education.

In finding authority for the dual service of people like Assemblywoman Averill, Attorney General Sandoval relied on California laws that held the separation of powers doctrine does not apply to local government employees. *People ex rel. Attorney General v. Provines*, 34 Cal. 520 (1868). The California court distinguished that the constitution set up the State government but not local and county governments. This decision was reaffirmed in California and is adopted in a majority of other jurisdictions. *Mariposa County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948). It should be noted that California was an appropriate state to draw from given that Nevada's Constitution was largely modeled after California's State Constitution. *See Aftercare of Clark County v. Justice Court of Clark County,* 120 Nev. 1, 82 P.3d 931 (2004). Attorney General Sandoval concluded his advisory opinion by stating the following: "Further, it is the opinion of this office that the constitutional requirement of separation of powers is not applicable to local governments. Accordingly, absent legal restrictions unrelated to the separation of powers doctrine, a local government employee may simultaneously serve as a member of the Nevada Legislature."

The second way that Secretary of State Heller sought clarification on this issue followed the advisory opinion in a petition for writ of mandamus that he sought challenging state government employees who also serve on the Legislature. *Heller v. Legislature of the State of Nevada*, 120 Nev. 456 (2008). The Court in *Heller* echoed and affirmed the language in Article 4, § 6 that only the Legislature has the authority to judge its members' qualifications. *Id.*, at 468, 93 P.3d at 755.

In denying the petition for writ of mandamus, the Nevada Supreme Court further held that it would be in violation of the Separation of Powers Doctrine to judicially legislate who

is eligible to serve in the Nevada Legislature, given that such a function lies with the Legislature itself.

The Legislature is given deference in determining who is qualified to be a member of the Legislature. As seen in *Heller*, the Supreme Court of Nevada refused to address this issue on the merits because to address the issue presented would in itself be a violation of the separation of powers. The Legislature was given the specific authority in the constitution to qualify their members, and the supreme court said that "by asking us to declare that dual service violates the separation of powers, the secretary urges our own violation of the separation of powers". *Heller* at 459.

If this Court were to prohibit a Deputy District Attorney from a righteous prosecution, and dismiss this case as requested by Defendant a result of her involvement, it would result in this Court also violating the separation of powers doctrine. Since the Legislature was granted this power in the Nevada Constitution, this authority cannot be usurped by the Judicial branch of the government without violating the separation of powers article of the Constitution.

Finally, this Court should be aware that the Legislative Counsel Bureau (LCB Legal) issued a recent opinion regarding this exact same issue. (Attached as Exhibit "1"). While LCB Legal initially affirms and reiterates much of what has been discussed above, it went further to also examine other jurisdictions, as well as the history of Nevada, in concluding that public employment is not a bar to serving in the Legislature.

II. DEFENDANT'S ENTIRE MOTION AMOUNTS TO A REQUEST TO REMOVE A DEPUTY DISTRICT ATTORNEY FROM HANDLING THE CASE

While Defendant has couched this argument as a Motion to Dismiss based upon a separation of powers argument, what he in essence is asking this Court to do is disqualify a particular deputy district attorney from handling this case. The *reason* cited is that her representation violates the Separation of Powers clause of the Nevada Constitution.

"To prevail on a motion to disqualify opposing counsel, the moving party must first establish 'at least a reasonable possibility that some specifically identifiable impropriety did

in fact occur,' and then must also establish that 'the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case.'" Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1270 (2000) (quoting Cronin v. District Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989)).

When a party wishes to disqualify a prosecutor, such impropriety must take the form of a conflict of interest. See NRPC 1.7, 1.9, 1.11; United States v. Kahre, 737 F.3d 554, 574 (2013) ("proof of a conflict [of interest] must be clear and convincing to justify removal of a prosecutor from a case."). Defendant has failed to demonstrate, or even address, the existence of a conflict of interest. Black's Law Dictionary defines "conflict of interest" as follows:

> 1) A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
> 2) A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

Black's Law Dictionary (11th ed. 2019).

The Defendant has failed to make a showing of a conflict of interest, by either definition. Under the first definition, Defendant has shown no evidence of incompatibility other than to argue that she serves in an agency of the executive branch. The second definition is clearly inapplicable here, as Defendant's request for disqualification is not based upon competing interests between clients. Thus, Defendant cannot demonstrate a conflict of interest.

Furthermore, Defendant can point to nothing about this case that gives rise to a conflict of interest between her various positions. First, although Deputy District Attorney Scheible serves in the Legislature, that public service is a part-time position. While serving at the Legislature, she exclusively serves the legislative branch. She receives no compensation from any executive branch agency, including her employer, during the time that she serves as a legislator. Therefore, although she has employment when she is not serving at the Legislature, she is not simultaneously exercising legislative and executive powers.

Second, there is nothing about the charges in this case that implicates a conflict of interest. The acts that Defendant committed were illegal well before the time that Deputy District Attorney Scheible was elected to the Legislature. Thus, there can be no argument that her service in this particular case gives rise to a conflict of interest because she was somehow involved with creating the law that she would later prosecute.

While the Defendant wishes to implicate that because Deputy District Attorney Scheible works in an executive agency, she would be the creator of the laws and then execute those laws, this is simply not the case in this prosecution. Deputy District Attorney Scheible, as an employee of the elected District Attorney, merely prosecutes cases that come before her. There are courts to ensure that all prosecutors, whether they serve as part-time legislators or not, are held to their legal responsibilities.

III. DISQUALIFICATION OF THIS PROSECUTOR WOULD BE A DIRECT VIOLATION OF THE SEPARATION OF POWERS

To disqualify Deputy District Attorney Scheible would itself implicate the Separation of Powers clause of the Nevada Constitution. Disqualification is a drastic measure that must be rarely used, as it implicates concerns regarding the separation of powers. Disqualification of an individual prosecutor by a district court is potentially an interference with the executive branch's mandatory role to enforce the law. See Nev. Const. art. III, § 1 ("[t]he powers of the Government of the State of Nevada shall be divided into three separate departments,--the Legislative,--the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others...").

"A district court does not have general supervisory powers over the co-equal executive branch of government." *United States v. Dominguez-Villa*, 954 F.2d 562, 565 (9th Cir. 1992). Thus, this Court does not have supervisory powers over the Clark County District Attorney's Office. For this reason, "the courts should not unnecessarily interfere with the performance of a prosecutor's duties." *State v. Eighth Jud. Dist. Ct. (Zogheib)*, 130 Nev. 158, 164, (2014) (citing *State v. Camacho*, 329 N.C. 589 (1991)).

Further, the Nevada Supreme Court has never expressly ruled that a district court possesses the authority to disqualify an individual prosecutor. *See, e.g., Wesley v. State*, 112 Nev. 503, 510, (1996) ("[t]his opinion does not reach the question of whether the district court has the authority to recuse a certain member of the district attorney's office from a case."). The sole Nevada case in which individual prosecutors were disqualified was *Rippo v. State*, in which two prosecutors participated in the execution of a search warrant, and were disqualified from prosecuting the case due to that participation, which resulted in one of the prosecutors testifying at trial. *Rippo v. State,* 113 Nev. 1239, 1247, 946 P.2d 1017, 1022 (1997).[1]

The deputies of the elected Clark County District Attorney have duties and responsibilities that are largely statutorily mandated. See NRS 252.110; NRS 252.070 ("[a]ll district attorneys may appoint deputies, who are authorized to transact all official business relating to those duties of the office set forth in NRS 252.080 and 252.090 to the same extent as their principals and perform such other duties as the district attorney may from time to time direct."). Accordingly, the Nevada courts must avoid interfering with Deputy District Attorneys in their performance of these duties. As a deputy assigned to a general litigation unit, Deputy District Attorney Scheible has been directed by an elected official to prosecute this case and represent the State in future proceedings. The exercise of such powers is not just statutorily authorized, but mandated.

IV. JUDGE SCOTTI'S RULING IS NOT BINDING LEGAL PRECEDENCE

Defendant cites Judge Richard Scotti's ruling in C-20-346852-A, *Jennifer Plumlee v. State*, as legal precedence that this Court should follow in Judge Scotti's footsteps. The cited arose from the defendant's misdemeanor conviction for driving a vehicle while under the influence. She was convicted in Justice Court at a misdemeanor trial, and the matter was appealed to Judge Scotti, who at the time was handling the appeals of misdemeanor convictions. Judge Scotti actually denied the appeal at first. It was not until defendant's counsel filed a new Motion to Reconsider, where the issue of separation of powers was first

[1]In Rippo, The Nevada Supreme Court also did not address whether or not the district court possesses the authority to disqualify individual prosecutors, as this issue was not raised on appeal. On appeal, the Court denied the Petitioner's claim that the district court should have disqualified the entire prosecutor's office. 113 Nev. at 1256, 946 P.2d at 1028.

raised, that Judge Scotti then considered and granted Defendant's appeal and reversed and remanded the case for a new trial.

Following the issuance of the order granting the appeal, the State filed a pending Motion for Clarification where the State wished to understand if the case was being dismissed, if Judge Scotti was confident in being a neutral arbiter of the case seeing that he had received a campaign donation from defendant's counsel on the day the State filed its response, and a request for Judge Scotti to stay his order so that the matter could be appealed to the Nevada Supreme Court. To date, the State's Motion for Clarification remains pending in Judge Scotti's department.

District courts have equal and coextensive jurisdiction and lack jurisdiction to review the acts of other district courts. *Rohlfing v. Second Jud. Dist. Ct.*, 106 Nev. 902 (1990). While nothing prohibits this Court from agreeing with any of Judge Scotti's findings, it certainly is not obligated to follow Judge Scotti's logic.

V. DISMISSAL WOULD NOT BE A PROPER REMEDY

Defendant argues that this case should be dismissed as a result of this alleged constitutional violation. He cites to the exclusionary rule to argue that evidence obtained in violation of a defendant's constitutional rights should be precluded. However, Defendant makes no argument as to what evidence was collected against him as part of the investigation or this case.

The fact that two independent victims came forward to accuse the Defendant of sexual assault as part of this investigation has no bearing on the issue at hand. The fact that a prosecutor was later assigned the case does not nullify the evidence that was collected against Defendant.

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CONCLUSION

The State respectfully requests that Defendant's Motion be denied.

DATED this 9th day of.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ALEXANDER CHEN
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar # 10539

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 9th day of December, 2020, by electronic transmission to:

RYAN A. HAMILTON
ryan@hamlegal.com

BY Celina Lopez
CELINA LOPEZ
Secretary for the District Attorney's Office

MS/cl/L5

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August 8, 2020

Brenda J. Erdoes, Esq.
Director
Legislative Counsel Bureau
401 S. Carson St.
Carson City, NV 89701

Dear Director Erdoes:

Pursuant to NRS 218F.710(2), you have asked the General Counsel of the Legal Division of the Legislative Counsel Bureau (LCB Legal) to address a question of constitutional law relating to the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution.[1]

In particular, you have asked whether the separation-of-powers provision prohibits state legislators from holding positions of *public employment* with the Executive Department of the Nevada State Government (hereafter "the state executive branch") or with local governments. In asking this question, you note that LCB Legal has addressed this question of constitutional law in: (1) prior legal opinions issued by LCB Legal in 2002 and 2003 which were disclosed to the public; and (2) prior legal arguments made by LCB Legal in 2004 before the Nevada Supreme Court in the case of Heller, Secretary of State v. Legislature of the State of Nevada, 120 Nev. 456 (2004).

In the Heller case, former Secretary of State Dean Heller brought a lawsuit against the Legislature claiming that the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution prohibits state legislators from holding positions of *public employment* with the state executive branch or with local governments. 120 Nev. at 458-60. As a remedy for the alleged separation-of-powers violations, the former Secretary of State asked the Nevada Supreme Court to oust or exclude state and local government employees from their seats in the Legislature. Id.

[1] NRS 218F.710(2), as amended by section 22 of Assembly Bill No. 2 (AB 2) of the 32nd Special Session of the Legislature, provides that upon the request of the Director, the General Counsel may give a legal opinion in writing upon any question of law.

EXHIBIT "1"

In response to the lawsuit, LCB Legal, which represented the Legislature in the litigation, argued in line with our prior legal opinions that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus, at 42-75 (May 4, 2004). In particular, LCB Legal argued that the Framers of the Nevada Constitution did not intend the separation-of-powers provision to prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. Id. at 42-68. By contrast, LCB Legal argued that the Framers intended the separation-of-powers provision to prohibit legislators from holding only *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. Id. Finally, LCB Legal argued that the Framers did not intend the separation-of-powers provision to prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision applies only to the three departments of state government, and local governments and their officers and employees are not part of one of the three departments of state government. Id. at 68-76.

On July 14, 2004, the Nevada Supreme Court decided the Heller case in favor of the Legislature, but the court decided the case on different legal grounds from the separation-of-powers challenge raised by the former Secretary of State. Consequently, the Nevada Supreme Court did not decide the merits of the separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. Since the Heller case in 2004, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of such a separation-of-powers challenge in a reported case.

In the absence of any controlling Nevada case law directly on point, you have asked whether it remains the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Given that there is no controlling Nevada case law directly on point to resolve this question of constitutional law, we again have carefully considered: (1) historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution; (2) historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution; (3) historical evidence of the practices in the Nevada Legislature since statehood; (4) legal treatises and other authorities on constitutional law; (5) case law from other jurisdictions interpreting similar state constitutional provisions; (6) common-law rules governing public officers and employees; and (7) the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. Taking all these compelling historical factors, legal authorities and public policies into consideration—along with our prior legal opinions on this question of constitutional law—it remains the

opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments.

BACKGROUND

The Heller case is the primary Nevada case discussing the proper procedure for raising a separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. Therefore, in discussing this question of constitutional law, we must begin by analyzing the Heller case in some detail.

On April 2, 2004, former Secretary of State Dean Heller, who was represented in the litigation by former Attorney General Brian Sandoval, filed an original action in the Nevada Supreme Court in the form of a petition for writ of mandamus (mandamus petition) which asked the court to oust or exclude state and local government employees from their seats in the Legislature. 120 Nev. at 458-60. In the mandamus petition, the former Secretary of State argued that the separation-of-powers provision prohibits legislators from holding positions of *public employment* as state executive branch employees and also "question[ed] whether local government employees may serve as legislators without violating separation of powers." Id. With regard to state executive branch employees, the former Secretary of State asked the Nevada Supreme Court to "declare state executive branch employees unqualified to serve as legislators, and then direct the Legislature to comply with [that] declaration and either remove or exclude those employees from the Legislature." Id. at 460.

As part of the mandamus petition, the former Secretary of State attached as exhibits two legal opinions from LCB Legal—one issued to former Assemblyman Lynn Hettrick on January 11, 2002, and one issued to former Assemblyman Jason Geddes on January 23, 2003. Heller v. Legislature, Case No. 43079, Doc. No. 04-06157, Petition for Writ of Mandamus (Apr. 2, 2004) (Exhibits B-1 and B-2). In the two opinions, LCB Legal found that the separation-of-powers provision only prohibits legislators from holding *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. However, LCB Legal also found that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. Based on our interpretation of the separation-of-powers provision, LCB Legal determined that certain positions of *public employment* with, respectively, the Nevada Department of Transportation and the University and Community College System of Nevada (now the Nevada System of Higher Education), were not *public offices* in the state executive branch because the positions did not involve the exercise of any sovereign functions appertaining to the state executive branch. Therefore, LCB Legal concluded that legislators could hold the respective positions of *public employment* without violating the separation-of-powers provision.

Also as part of the mandamus petition, the former Secretary of State attached as an exhibit a legal opinion issued by former Attorney General Sandoval—AGO 2004-03 (Mar. 1, 2004)—which disagreed with the two legal opinions issued by LCB Legal. Heller v. Legislature, Case No. 43079, Doc. No. 04-06157, Petition for Writ of Mandamus (Apr. 2, 2004) (Exhibit A). In AGO 2004-03, the former Attorney General concluded that the separation-of-powers provision prohibits legislators from holding both *public offices* and positions of *public employment* with the state executive branch, whether or not such positions exercise any sovereign functions appertaining to the state executive branch. AGO 2004-03, at 23-25. However, with regard to local government employees, the former Attorney General concluded that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision is not applicable to local governments. Id. at 26.

In the Legislature's answer to the mandamus petition, LCB Legal responded comprehensively and thoroughly in opposition to the legal conclusion in AGO 2004-03 that the separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch. Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus, at 42-68 (May 4, 2004). Specifically, LCB Legal demonstrated through extensive citation to historical evidence and well-established legal authorities that the legal conclusion in AGO 2004-03 is not entitled to any persuasive weight for the following reasons: (1) it used incompletely researched and therefore inaccurate historical evidence; (2) it relied on inapt and inapplicable case law; (3) it failed to properly apply the rules of constitutional construction; and (4) it was not supported by relevant and persuasive legal authorities.[2]

For example, because the Nevada Constitution was modeled on the California Constitution of 1849, AGO 2004-03 attempts to use historical evidence and case law from California to support its legal conclusion that Nevada's legislators are prohibited from holding positions as state executive branch employees. AGO 2004-03, at 9-10. However, the historical evidence and case law from California actually proves the exact opposite. During California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many

[2] We note that the legal opinions of the Attorney General and LCB Legal do not constitute binding legal authority or precedent. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203 (2001); Lorton v. Jones, 130 Nev. 51, 62 n.7 (2014). Instead, such legal opinions are entitled only to such persuasive weight as the courts think proper based on the legal reasoning and citation to relevant legal authorities that support the opinion. See Tahoe Reg'l Planning Agency v. McKay, 590 F. Supp. 1071, 1074 (D. Nev. 1984), *aff'd*, 769 F.2d 534 (9th Cir. 1985); Santa Clara Cnty. Local Transp. Auth. v. Guardino, 902 P.2d 225, 238 (Cal. 1995).

years' standing."). As more fully addressed in the legal discussion below, this is but one example of many historical and legal flaws that undermine the persuasive weight of AGO 2004-03.

However, in the Heller case, because the Nevada Supreme Court decided the case in favor of the Legislature on different legal grounds from the separation-of-powers challenge raised by the former Secretary of State, the court did not resolve the conflicting legal conclusions expressed in AGO 2004-03 and the two legal opinions issued by LCB Legal. 120 Nev. at 466-72. Nevertheless, the court's decision in the Heller case established some important legal principles governing separation-of-powers challenges and the exclusive constitutional power of each House of the Legislature to judge the qualifications of its members under Article 4, Section 6 of the Nevada Constitution. Id.

In the Heller case, as a remedy for the alleged separation-of-powers violations, the former Secretary of State asked the Nevada Supreme Court to oust or exclude state and local government employees from their seats in the Legislature. Id. at 458-60. However, in light of the requested remedy, the court declined to decide the merits of the separation-of-powers challenge because each House is invested with the exclusive constitutional power to judge the qualifications of its members under Article 4, Section 6, which provides in relevant part that "[e]ach House shall judge of the qualifications, elections and returns of its own members." Id. at 466. Based on the exclusive constitutional power in Article 4, Section 6, and guided by cases from other states interpreting similar constitutional provisions, the court found that Article 4, Section 6 "insulates a legislator's qualifications to hold office from judicial review," which means that "a legislative body's decision to admit or expel a member is almost unreviewable in the courts." Id. at 466-67.

As a result, the court determined that the judicial branch does not have the constitutional power to oust or exclude legislators from their *legislative seats* based on separation-of-powers challenges. Id. at 466-72. In other words, the court concluded that such separation-of-powers challenges to legislators' qualifications to hold their *legislative seats* are not "justiciable" in the courts. Id. at 472 ("[T]he Secretary asks this court to judge legislators' qualifications based on their executive branch employment. This request runs afoul of the separation of powers and is not justiciable."). As further explained by court:

> Ironically, the Secretary's attempt to have state executive branch employees ousted or excluded from the Legislature is barred by the same doctrine he relies on—separation of powers. The Nevada Constitution expressly reserves to the Senate and Assembly the authority to judge their members' qualifications. Nearly every state court to have confronted the issue of dual service in the legislature has found the issue unreachable because a constitutional reservation similar to Nevada's created an insurmountable separation-of-powers barrier. Thus, by asking us to declare that dual service violates separation of powers, the Secretary urges our own violation of separation of powers. We necessarily decline this invitation.

Id. at 458-59.

However, because neither the state executive branch nor local governments possess any constitutionally-based powers that are similar to the exclusive constitutional powers of the legislative branch under Article 4, Section 6, the Nevada Supreme Court determined that the judicial branch has the constitutional power to consider—in a properly brought lawsuit against a legislator—a separation-of-powers challenge to the legislator's qualifications to hold his or her position of *public employment* with the state executive branch or with a local government. Id. at 472-73. As explained by the court:

> [A]lthough a court may not review a state employee's qualifications to sit as a legislator, a court may review a legislator's employment in the executive branch. This dichotomy exists because no state constitutional provision gives the executive branch the exclusive authority to judge its employees' qualifications. Often then, cases discussing and resolving the dual service issue arise when a legislator seeks remuneration for working in the executive branch or when a party seeks to remove a legislator from executive branch employment.

Id. at 467-68.

With this background in mind, we turn now to a comprehensive and thorough legal discussion to address the question of constitutional law of whether the separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch or with local governments. For the reasons set forth in the discussion below, it remains the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments.

DISCUSSION

I. Overview of state constitutional provisions.

Many state constitutions contain provisions that directly address the issue of a person holding more than one position in government. Scott M. Matheson, Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics and Constitutional Policy, 1988 Utah L. Rev. 295, 355-69 (1988). For example, the state constitution of Texas contains a broad provision that prohibits any public officer in any branch of government from accepting or occupying another public office. See, e.g., Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); State ex rel. Hill v. Pirtle, 887 S.W.2d 921 (Tex. Crim. App. 1994). Some state constitutions contain more limited provisions that prohibit members of the state legislature from accepting or occupying another public office. See, e.g., Hudson v. Annear, 75 P.2d 587 (Colo. 1938); McCutcheon v. City of St. Paul, 216 N.W.2d 137 (Minn. 1974). Finally, some state constitutions contain provisions that prohibit members of the state legislature from accepting or occupying any position of employment in state government,

whether or not the position is considered to be a public office. See, e.g., Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Parker v. Riley, 113 P.2d 873 (Cal. 1941); Stolberg v. Caldwell, 402 A.2d 763 (Conn. 1978).

The Nevada Constitution does not contain any broad provisions with regard to incompatible public offices. See State ex rel. Davenport v. Laughton, 19 Nev. 202, 206 (1885) (holding that "[t]here is nothing in the constitution of this state prohibiting respondent from holding the office of lieutenant-governor and the office of state librarian."); Crosman v. Nightingill, 1 Nev. 323, 326 (1865) (holding that there is nothing in the constitution prohibiting a person from holding the offices of Lieutenant Governor and warden of the state prison at the same time). Rather, the Nevada Constitution contains only a few specific provisions concerning incompatible public offices. See Nev. Const. art. 4, §§ 8 and 9; art. 5, § 12; art. 6, § 11. However, for the purposes of this opinion, those specific provisions are not relevant to answering your question.

Thus, the Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. As a result, in the absence of any specific constitutional provisions that are applicable to this matter, any challenge to the constitutionality of legislators holding positions of *public employment* with the state executive branch or with local governments must be based on the general separation-of-powers provision in Article 3, Section 1. That provision provides in full:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons *charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others*, except in the cases expressly directed or permitted in this constitution.

Nev. Const. art. 3, § 1 (emphasis added).

As discussed previously, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of a separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. In one case, the Nevada Supreme Court considered the constitutionality of a statute that made the Secretary of State the ex officio Clerk of the Supreme Court, but the court declined to rule on the separation-of-powers issue. State ex rel. Josephs v. Douglass, 33 Nev. 82, 92 (1910), *overruled in part on other grounds*, State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 765-66 (2001). The petitioner in Douglass argued that the statute violated the separation-of-powers provision in the Nevada Constitution, and although the court found that the statute was unconstitutional, it based its decision on other constitutional grounds. 33 Nev. at 91-92. Specifically, the court stated:

> It has been urged that as these two offices appertain to separate and distinct coordinate departments of the state government, it would be in violation of article 3 of the constitution to combine them, but as this contention is not clearly manifest, both offices being mainly ministerial in character, and as the question can be determined upon another view of the case, we give this point no consideration further than to observe that it emphasizes the fact that the two offices are distinct, and that the duties of one do not pertain to the duties of the other.

Id. at 92.

In State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), former Attorney General W. T. Mathews raised a separation-of-powers challenge against former State Senator John H. Murray who, while a member of the Legislature, accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. Id. at 119-20. However, as will discussed in greater detail below in the section dealing with the common-law differences between public officers and public employees, the Nevada Supreme Court decided the case on different legal grounds, and it did not address or decide the merits of the separation-of-powers challenge raised by the Attorney General. Id. at 120-24.

At least one state court in New Hampshire has held that the separation-of-powers provision in its state constitution does not apply to the issue of incompatible public offices because that issue is addressed in other, more specific provisions of the constitution. Attorney-General v. Meader, 116 A. 433, 434 (N.H. 1922). Considering that the issue of incompatible public offices is specifically addressed in the Nevada Constitution in Article 4, Sections 8 and 9, Article 5, Section 12, and Article 6, Section 11, it could be argued that the Framers intended those provisions to be the exclusive constitutional basis for determining whether a person is holding incompatible public offices. However, such an interpretation of the Nevada Constitution is unlikely given the numerous court decisions holding that the separation-of-powers doctrine applies to the issue of incompatible public offices.

Consequently, to address your question fully, we must determine whether Nevada's separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch or with local governments. Under Nevada's separation-of-powers provision, because legislators hold elective offices that are expressly created by Article 4 of the Nevada Constitution governing the Legislative Department, legislators are "charged with the exercise of *powers* properly belonging to one of these departments"—the Legislative Department. Nev. Const. art. 3, § 1 (emphasis added). As a result, legislators are not allowed by the separation-of-powers provision to "exercise any *functions*, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Id. (emphasis added).

Thus, the critical issue under the separation-of-powers provision is whether legislators who hold positions of *public employment* with the state executive branch or with local governments "exercise any *functions*" appertaining to the state executive branch which cause

their public employment to be constitutionally incompatible with their service as legislators in the state legislative branch. In resolving this issue, because there is no controlling Nevada case law directly on point, we must consider historical evidence, legal treatises and other authorities on constitutional law, case law from other jurisdictions interpreting similar state constitutional provisions, common-law rules governing public officers and employees and, most importantly, the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. We begin by examining historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution, historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution, and historical evidence of the practices in the Nevada Legislature since statehood.

II. Historical evidence.

A. Federal Government and Congress.

In AGO 2004-03, the former Attorney General relies heavily on statements made by the Founders of the United States Constitution in the Federalist Papers. Specifically, AGO 2004-03 states that "[t]he the Federalist Papers are quite instructive in the instant analysis. The concerns raised by the founders with regard to the separation of powers are as relevant to the question presented in this opinion as they were 216 years ago." AGO 2004-03, at 8. However, upon a careful examination of the Federalist Papers, federal judicial precedent and long-accepted historical practices under the United States Constitution, it is clear the Founders did not believe that the doctrine of separation of powers absolutely prohibited an officer of one department from performing functions in another department.

On many occasions, the United States Supreme Court has discussed how the Founders adopted a pragmatic, flexible view of the separation of powers in the Federalist Papers. See, e.g., Mistretta v. United States, 488 U.S. 361, 380-82 (1989); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 441-43 (1977). Relying on the Federalist Papers, the Supreme Court has consistently adhered to "Madison's flexible approach to separation of powers." Mistretta, 488 U.S. at 380. In particular, Madison stated in the Federalist Papers that the separation of powers "'d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other.'" Id. at 380-81 (quoting The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961)).

In light of Madison's statements and other writings in the Federalist Papers, the Supreme Court has found that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." Mistretta, 488 U.S. at 380. Thus, as understood by the Framers in the Federalist Papers, the doctrine of separation of powers did not impose a hermetic, airtight seal around each department of government. See Loving v. United States, 517 U.S. 748, 756-57 (1996). Rather, the doctrine created a pragmatic, flexible template of overlapping functions and responsibilities so that three coordinate departments

could be fused into a workable government. See Mistretta, 488 U.S. at 380-81. Therefore, contrary to the inflexible and impractical interpretation of the doctrine of separation of powers advocated in AGO 2004-03, the Founders believed in a "pragmatic, flexible view of differentiated governmental power." Id. at 381.

Moreover, in the years immediately following the adoption of the United States Constitution, it was a common and accepted practice for judicial officers of the United States to serve simultaneously as executive officers of the United States. See Mistretta, 488 U.S. at 397-99. For example, the first Chief Justice, John Jay, served simultaneously as Chief Justice and Ambassador to England. Similarly, Oliver Ellsworth served simultaneously as Chief Justice and Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt. Id. at 398-99. Such long-accepted historical practices support the conclusion that the doctrine of separation of powers does not absolutely prohibit an officer of one department from performing functions in another department.

Finally, the Founders did not believe that, on its own, the doctrine of separation of powers would prohibit an executive officer from serving as a member of Congress. See 2 The Founders' Constitution 346-57 (Philip B. Kurland & Ralph Lerner eds., 1987). Therefore, the Founders added the Incompatibility Clause to the United States Constitution. Id. The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. The history surrounding the Incompatibility Clause supports the conclusion that the doctrine of separation of powers does not prohibit a legislator from holding a position of *public employment* in the executive branch.

In 1806, Congressman J. Randolph introduced a resolution into the House of Representatives which provided that "a contractor under the Government of the United States is an officer within the purview and meaning of the [Incompatibility Clause of the] Constitution, and, as such, is incapable of holding a seat in this House." 2 The Founders' Constitution 357. Congressman Randolph introduced the resolution because the Postmaster General had entered into a contract of *employment* with a person to be a mail carrier and, at the time, the person was also a member of the Senate. Id. at 357-62.

In debating the resolution, many Congressmen indicated that the Incompatibility Clause was the only provision in the Constitution which prohibited dual officeholding and that, based on the long-accepted meaning of the term "office," a person who held a contract of *employment* with the executive branch was not an officer of the United States and was not prohibited from serving simultaneously as a member of Congress. Id. After the debate, the House soundly rejected the resolution because many members believed the resolution banning members of Congress from *employment* with the executive branch contained an interpretation of the Incompatibility Clause which expanded the meaning of the provision well beyond its plain terms. Id.

Shortly thereafter, in 1808, Congress passed a federal law which prohibited an executive officer of the United States from entering into a contract of *employment* with a member of Congress. Id. at 371. A version of that federal law remains in effect. 18 U.S.C. § 431; 2 Op. U.S. Att'y Gen. 38 (1826) (explaining that the federal law prohibited all contracts of *employment* between officers of the executive branch and members of Congress).

Based on this historical evidence, it is quite instructive that, a mere 19 years after the United States Constitution was drafted, many members of the House of Representatives expressed the opinion that the Federal Constitution did not prohibit a person who held a contract of *employment* with the executive branch from serving simultaneously as a member of Congress. At the very least, this historical evidence casts significant doubt on the legal conclusion in AGO 2004-03 that the doctrine of separation of powers prohibits an officer of one department from being employed in another department.

B. California Legislature.

In AGO 2004-03, the former Attorney General correctly notes that because the Framers of the Nevada Constitution modeled its provisions on the California Constitution of 1849, it is appropriate to consider historical evidence and case law from California when interpreting analogous provisions of the Nevada Constitution. AGO 2004-03, at 9-10; State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 763 (2001).

No California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee. Nevertheless, AGO 2004-03 incorrectly claims that in Staude v. Bd. of Election Comm'rs, 61 Cal. 313 (1882), the California Supreme Court found that Senators and Assemblymen could not simultaneously serve in the executive and judicial departments as defined in Article V and Article VI of the California Constitution. AGO 2004-03, at 9. However, that specific issue was never raised before the court, and the court never decided such an issue. It is a fundamental rule of law that a case cannot be cited for authority on an issue that was never raised or decided. See Jackson v. Harris, 64 Nev. 339, 351 (1947); Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 172-73 (1931); Jensen v. Pradere, 39 Nev. 466, 471 (1916).

Moreover, when a court makes statements of a general nature in an opinion and those statements are unnecessary to the determination of the questions involved in the case, those statements are mere dictum and have no precedential value. See Stanley v. A. Levy & J. Zentner Co., 60 Nev. 432, 448 (1941); Dellamonica v. Lyon Cnty. Bank Mort. Corp., 58 Nev. 307, 316 (1938). Based on general statements or dictum used by the California Supreme Court in Staude, it appears that the court believed the separation-of-powers provision only prohibited a legislator from being an *officer* in the executive branch. The legal distinction between a state officer and a state employee was well established in the law when the California Supreme Court decided Staude. It is reasonable to assume that the court meant what it said:

> So of each *officer* of the Executive Department—he cannot belong to the Judicial or Legislative Department. That is to say, he can hold no judicial *office*, nor the *office* of Senator or member of the Assembly. And so of Senators and members of the Assembly—they can hold no judicial or executive *offices* comprised within the Executive and Judicial Departments, as defined in Articles V and VI.

Staude, 61 Cal. at 323 (quoting People ex rel. Att'y Gen. v. Provines, 34 Cal. 520, 534 (1868)) (emphasis added).

Thus, if the California case of Staude stands for anything on this issue, it is the principle that the separation-of-powers provision prohibits a legislator from being a state *officer* in the executive branch. Neither the facts nor dictum in the case support the proposition that the separation-of-powers provision prohibits a legislator from being a state *employee*.

Finally, AGO 2004-03 also incorrectly claims that in Elliott v. Van Delinder, 247 P. 523 (Cal. Dist. Ct. App. 1926), the court found that the separation-of-powers provision in the California Constitution means that no person shall hold positions under different departments of the government at the same time, and that a person cannot be an employee of the state department of engineering and a township justice of the peace at the same time. AGO 2004-03, at 9. However, in the Heller case, the Nevada Supreme Court rejected the former Attorney General's incorrect reading of Elliott v. Van Delinder because the California court never reached the merits of the separation-of-powers issue. 120 Nev. at 470.

In sum, the reliance in AGO 2004-03 on California case law is misplaced because the California cases cited by the former Attorney General do not support the legal reasoning or conclusions contained in AGO 2004-03, and because no California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee.

Furthermore, the historical evidence from California establishes that during California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many years' standing.").

At the general election held in California on November 7, 1916, one of the ballot questions was Amendment No. 6, which was an initiative measure to amend Cal. Const. art. 4, § 19, to read as follows:

> No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state;

> *provided*, that this provision shall not apply to any office filled by election by the people.

1916 Cal. Stat. 54 (As a result of subsequent constitutional amendments, the substance of the 1916 constitutional amendment is now found in Cal. Const. art. 4, § 13, which provides: "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office.").

In the weeks leading up to the 1916 general election, the proposed constitutional amendment was described in several California newspapers. In an article dated October 28, 1916, the San Francisco Chronicle reported that:

> Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election, for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State.

Measure Alarms Legislators on 'Side' Payroll, S.F. Chron., Oct. 28, 1916, at 5, *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 9).

In another article dated October 28, 1916, the Sacramento Bee reported that many California Legislators were employed at that time by executive branch agencies, including the State Lunacy Commission, State Motor Vehicles Department, State Labor Commissioner, State Pharmacy Commission, State Pharmacy Board, State Railroad Commission, Folsom State Prison and State Inheritance Tax Commission. Chambers Studies Amendment No. 6: Proposal to Make Legislature Members Ineligible to State Jobs is Perplexing, Sacramento Bee, Oct. 28, 1916, at 9, *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 11).

On the ballot at the 1916 general election, the ballot arguments relating to the proposed constitutional amendment stated that "some of our most efficient officials have been men holding appointments under the state, [while] at the same time being members of the legislature." Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 7, 1916 (Cal. State Archives 1916), *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 13). Those arguments also stated that:

> Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection

> with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.
>
> * * *
>
> Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years.

Id.

Shortly after the constitutional amendment was adopted, the California Court of Appeal was called upon to interpret whether the amendment applied to legislators whose terms began before the effective date of the amendment. Chenoweth v. Chambers, 164 P. 428 (Cal. Dist. Ct. App. 1917). The court held that the amendment was intended to apply to those legislators. Id. at 434. In reaching its holding, the court noted that the constitutional amendment "was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated." Id. at 430.

Taken together, these historical accounts establish that before the California Constitution was amended in 1916, California Legislators routinely held positions as state executive branch employees. This is notable because, at that time, the separation-of-powers provision in the California Constitution was nearly identical to the separation-of-powers provision in the Nevada Constitution. Thus, the historical evidence in California supports the conclusion that, in the absence of a specific constitutional amendment expressly banning legislators from public employment, the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee.

C. Nevada Legislature.

For many decades, state and local government employees have served simultaneously as members of the Nevada Legislature. Affidavit of Guy L. Rocha, Former Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of Nevada (Apr. 29, 2004), *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 1-3). Although there are no official records specifically detailing the occupations of legislators who served in the Legislature during the 1800s and early 1900s, the records that are available indicate that state and local government employees have been serving in the Legislature since at least 1903. Id. The earliest known examples of local government employees who served as members of the Legislature are Mark Richards Averill, who was a member of the Assembly in 1903, and Ruth Averill, who was a member of the Assembly in 1921. Id. The earliest known examples

of state executive branch employees who served as members of the Legislature are August C. Frohlich, who was a member of the Assembly in 1931, and Harry E. Hazard, who was a member of the Assembly in 1939. Id.

Based on research conducted by the Legislative Counsel Bureau covering the period from 1967 to 2019, state and local government employees have served as members of the Legislature during each regular session convened over the past 50-plus years. See Nevada Legislative Manual (LCB 1967-2019); Affidavit of Donald O. Williams, Former Research Director of the Research Division of the Legislative Counsel Bureau of the State of Nevada (Apr. 28, 2004), *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 4-5).

Thus, the historical evidence from the Nevada Legislature supports the conclusion that the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee or a local government employee. Under well-established rules of constitutional construction, this historical evidence represents a long-standing interpretation of the separation-of-powers provision by the Legislature which must be given great weight.

When interpreting a constitutional provision, the Nevada Supreme Court "looks to the Legislature's contemporaneous actions in interpreting constitutional language to carry out the intent of the framers of Nevada's Constitution." Halverson v. Miller, 124 Nev. 484, 488-89 (2008). Because the Legislature's interpretation of a constitutional provision is "likely reflective of the mindset of the framers," such a construction "is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper." Id. (internal quotation marks omitted); Hendel v. Weaver, 77 Nev. 16, 20 (1961); State ex rel. Herr v. Laxalt, 84 Nev. 382, 387 (1968); Tam v. Colton, 94 Nev. 452, 458 (1978).

Furthermore, when the Legislature's construction is consistently followed over a considerable period of time, that construction is treated as a long-standing interpretation of the constitutional provision, and such an interpretation is given great weight and deference by the Nevada Supreme Court, especially when the constitutional provision involves legislative operations or procedures. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). As a result, "[a] long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight." Howell, 26 Nev. at 104.

The weight given to the Legislature's construction of a constitutional provision involving legislative operations or procedures is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. See, e.g., Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 539-40 (2001). Under such circumstances, the Nevada Supreme Court has stated that "although the [interpretation] of the legislature is not final, its

decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399-400 (1876).

The Nevada Supreme Court has also stated that when the meaning of a constitutional provision involving legislative operations or procedures is subject to any uncertainty, ambiguity or doubt, the Legislature may rely on an opinion of LCB Legal which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540. For example, when the meaning of the term "midnight Pacific standard time," as formerly used in the constitutional provision limiting legislative sessions to 120 days, was subject to uncertainty, ambiguity and doubt following the 2001 regular session, the Nevada Supreme Court explained that the Legislature's interpretation of the constitutional provision was entitled to deference because "[i]n choosing this interpretation, the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation." Id.

With regard to state and local government employees serving as legislators, the Legislature has chosen to follow LCB Legal's long-standing interpretation of the separation-of-powers provision for decades, and it has acted on LCB Legal's opinion that this is a reasonable construction of the separation-of-powers provision. As a result, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540.

Therefore, under the rules of constitutional construction, the Legislature's long-standing interpretation of the separation-of-powers provision "should be given great weight." Howell, 26 Nev. at 104 ("A long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight."). Furthermore, to the extent there is any ambiguity, uncertainty or doubt concerning the interpretation of the separation-of-powers provision, the interpretation given to it by the Legislature "ought to prevail." Dayton Gold & Silver Mining, 11 Nev. at 400 ("[I]n case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.").

III. Case law from other jurisdictions.

Several courts from other jurisdictions have decided cases involving the legal issue of whether a state constitutional separation-of-powers provision prohibits legislators from being state or local government employees. However, the cases from the other jurisdictions are in conflict on this issue. Because the cases are in conflict, we believe that it will be helpful to review those cases in some detail.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch of state government at the same time that he was serving as a member of the state legislature. Id. at 412. At the time, the separation-of-powers provision in the Montana Constitution provided that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." Id. at 413. The complaint also alleged that Reed was violating section 7 of article 5 of the state constitution, which provided that "[n]o senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State." Id. The Montana Supreme Court framed the issue it was deciding as follows:

> The only question for us to decide is—is the position of auditor, held by Grant Reed, a civil office(?); for, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of the state government. In the latter event, Article IV of the Constitution [separation of powers] is not involved.

Id.

After considering voluminous case law concerning the definition of a "civil office," including cases from Nevada that we will discuss below, the Montana Supreme Court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee "holding a position of employment, terminable at the pleasure of the employing power, the Board of Railroad Commissioners." Id. Thus, because Reed did not occupy a civil office, the court concluded that he had "no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and, therefore, his appointment was not violative of Article IV of the Constitution [separation of powers]." Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: "no person or collection of persons charged with the exercise of

powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]" Id. at 1094.

Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another branch of government. Id. Because only public officers exercised sovereign power, the court determined that the separation-of-powers provision "applies [only] to public officers, not employees, in the different branches of government." Id. at 1095. After considering the nature of the public school positions, the court concluded that "[p]ublic school instructors and administrators are not 'public officials.' They do not establish policy for the local school districts or for the state department of education." Id. at 1094. Instead, "[a] school teacher employed by a common school district is [an] 'employee' not [an] 'officer', and the relationship between school teacher and school board is contractual only." Id. at 1095 (citing Brown v. Bowling, 240 P.2d 846, 849 (N.M. 1952)). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado's separation-of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would not prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing court decisions are several court decisions from Indiana, Oregon and Nebraska. The court decisions from Indiana and Oregon are especially notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada's separation-of-powers provision.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four members of the state legislature salaries that they had earned while occupying positions with various state commissions and boards in the executive branch of government. After reviewing the relevant statutes relating to these positions, the court held that the legislators' positions in the executive branch "are not public offices, nor do they in their respective positions, perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired." Id. at 299. In other words, "[i]n performing their respective jobs,

none of these [legislators] were vested with any functions pertaining to sovereignty." Id. Having determined that the legislators occupied positions of public employment, rather than public offices, the court's next task was to determine whether such public employment in another branch of state government violated Indiana's separation-of-powers provision, which provided at the time that "no person, charged with official duties under one of these departments[,] shall exercise any of the functions of another[.]" Id. The court framed the issue as follows: "[I]t now becomes necessary for this Court to determine what is the meaning of the phrase 'any of the functions of another,' as set out in the above quoted section of the Constitution." Id.

In interpreting the use of the term "functions," the court noted that the term "power" had been used instead of the term "functions" in the original draft of the separation-of-powers provision. Id. at 302. However, the term "functions" was inserted in the final version of the provision that was adopted by the drafters of the constitution. Id. The court then stated that "[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'" Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a member of the state legislature was prohibited from being employed by the executive department of state government pursuant to the separation-of-powers provision in the Louisiana Constitution, which provided at the time that "[no] person or collection of persons holding office in one of [the departments], shall exercise power properly belonging to either of the others[.]" Saint, 126 So. at 550. In particular, the Louisiana Supreme Court held that:

> It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words "exercise power," speaking officially, mean perform duties or functions.

Id. at 555.

Based on the Saint case and other court decisions, the Indiana Supreme Court in Burch concluded that:

> In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an

> employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, 315 P.2d 797 (Or. 1957), *superseded by* Or. Const. art. XV, § 8. In that case, the court was asked "to determine whether or not [a state legislator, Mr. Monaghan,] is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives." Id. at 799. At that time, the separation-of-powers provision in the Oregon Constitution provided that "no person charged with official duties under one of these departments, shall exercise any of the functions of another[.]" Id. at 800. Mr. Monaghan argued that the term "official duties" was synonymous with the term "functions," and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to a person merely occupying a position of public employment. Id. at 801. The court flatly rejected this argument:

> It is not difficult to define the word "official duties." As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is "charged with official duties." But the exercise of the "functions" of a department of government gives to the word "functions" a broader sweep and more comprehensive meaning than "official duties." It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the "official duties" of any one officer.
>
> It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O'Donoghue v. United States, supra [289 U.S. 516], in a sense, his role as a teacher subjugates the department of his employment to the possibility of being "controlled by, or subjected, *directly or indirectly*, to the coercive influence of" the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, supra [80 N.E.2d 294, 302], when considering the word "functions" in its similar setting in the Indiana Constitution, the court observed that the term "functions" denotes a broader field of activities than the word "power."
>
> * * *

> Our conclusion is that the word "functions" embodies a definite meaning with no contradiction of the phrase "official duties," that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-04. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department of state government. Id. at 804-06. Therefore, the court held that Mr. Monaghan could not be employed as a public school teacher while he held a position as a member of the state legislature. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). However, the amendment did not apply to other branches of state government. Id. In Sawyer, the Oregon Supreme Court was asked whether the state's separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

> It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs "functions" of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that "[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher." Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska's separation-of-powers provision provided that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others." Id. at 404.

Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the

public officer-public employee distinction was not "determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons 'being one of' the branches of government." Id. at 408. Rather, the court found that "[t]he unusual expression 'being one of these departments' is not clear; accordingly, construction is necessary. One thing that is clear, however, is that 'being one of these departments' is not intended to be synonymous with 'exercising any power of' a branch." Id. at 409.

After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, "no person or collection of persons being [a member of] one of these departments." Id. at 412. Based on this construction, the court held that the separation-of-powers provision "prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

> Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.
>
> * * *
>
> The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.
>
> Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.
>
> * * *
>
> Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

If the Nevada Supreme Court were to follow the reasoning of the courts of Indiana, Oregon and Nebraska, rather than the reasoning of the courts of Montana, New Mexico and

Colorado, a state executive branch employee could not, pursuant to Nevada's separation-of-powers provision, serve as a member of the Legislature. Although we cannot determine with any reasonable degree of certainty whether the Nevada Supreme Court would adopt those holdings, we do believe that the decisions of those courts are not consistent with the text and structure of the Nevada Constitution. In particular, while we agree with the courts of Indiana and Oregon that the term "functions" is distinct in meaning from other terms such as "powers" or "duties," we do not believe that the meaning ascribed to the term "functions" in Burch and Monaghan is consistent with the structure and organization of Nevada's government.

Thus, despite the holdings of the courts of Indiana, Oregon and Nebraska, it is the opinion of LCB Legal that Nevada's separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Obviously, we cannot say with any certainty whether the Nevada Supreme Court would agree with our opinion. However, as we explain next, we do believe that our opinion is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

IV. Interpretation of Nevada's separation-of-powers provision with regard to state executive branch employees.

It is a fundamental rule of constitutional construction that the Nevada Constitution must be interpreted in its entirety and that each part of the Constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the Nevada Constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these phrases must be read in light of the other parts of the Nevada Constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by the Nevada Supreme Court:

> [Article 3, Section 1] divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. *These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers.*

Sawyer v. Dooley, 21 Nev. 390, 396 (1893) (emphasis added).

According to the Nevada Supreme Court, the prohibition in Article 3, Section 1 applies only to persons who are charged by other parts of the Nevada Constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in section 1 of article V the Utah Constitution. As to that provision, the Utah Supreme Court has held:

> [T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the Nevada Constitution. As a result, when the Nevada Constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Bd. of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525, 531 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by the Nevada Supreme Court:

> [T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township. . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature[.]

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, "one which is created by the constitution itself, and the other which is created by statute." Douglass, 33 Nev. at 93 (quoting People v. Bollam, 54 N.E. 1032, 1033 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any "powers" appertaining to another department of state government. However, the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any "functions" appertaining to another department of state government. We believe that the Framers used the term "functions" because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers *and* by nonconstitutional officers. Thus, had the Framers used only the term "powers" in Article 3, Section 1, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another department. To avoid this restrictive construction, we believe that the Framers used the term "functions" to ensure that a constitutional officer in one department could not perform the *sovereign functions* entrusted to both constitutional officers *and* nonconstitutional officers in another department.

Therefore, by using the term "functions," we believe that the Framers intended to prohibit a constitutional officer in one department from holding constitutional offices or nonconstitutional offices in another department, because persons holding constitutional or nonconstitutional offices in another department exercise the *sovereign functions* of state government. Because public employees do not exercise the sovereign functions of state government, we do not believe that the Framers intended to prohibit a constitutional officer from holding a position of *public employment* in another department of state government. Our conclusion is based on a well-established body of case law which holds that public officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), the Nevada Supreme Court discussed extensively the attributes of a public office, and the court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, the Nevada Supreme Court concluded that the single most important characteristic of a public office is that the person who

holds such a position is "*clothed with some portion of the sovereign functions of government.*" Cole, 38 Nev. at 229 (quoting Attorney-General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, the court expressed a similar view:

> The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953) (citation omitted). Simply put, "the sovereign function of government is not delegated to a mere employee." Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. We believe this is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and we believe that this is why the Framers used the word "functions" in Article 3, Section 1—to prohibit a constitutional officer in one department of state government from holding any other *public office* that was empowered, either by the constitution or statute, to exercise the sovereign functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term "functions" to include public employees would not be consistent with the manner in which the sovereign functions of government are exercised in Nevada.

Moreover, a broader construction of the term "functions" to include public employees would run counter to "the constituency concept of our legislature in this state, which can accurately be described as a citizens' legislature." Stratton, 806 P.2d at 1093. Thus, we believe that the Framers of the Nevada Constitution realized that "[i]n a sparsely populated state . . . it would prove difficult, if not impossible, to have a conflict-free legislature." Id. In addition, we believe that any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated by Justice Crockett of the Utah Supreme Court:

> In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in Article 4, Section 2 of the Nevada Constitution, and they originally limited those biennial sessions to 60 days in Article 4, Section 29. Although Article 4, Section 29 was repealed in 1958, the fact that the citizens of Nevada voted in 1998 to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body.

The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

> A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, we believe that construing the term "functions" in Article 3, Section 1 to prohibit a member of the Nevada Legislature from occupying a position of *public employment* would not comport with the concept of the "citizen-legislator" that was undoubtedly envisioned by the Framers of the Nevada Constitution.

In sum, it is the opinion of LCB Legal that the separation-of-powers provision in the Nevada Constitution only prohibits a legislator from holding a *public office* in another department of state government, because a person who holds a *public office* exercises sovereign functions appertaining to another department of state government. However, it is also the opinion of LCB Legal that the separation-of-powers provision in the Nevada Constitution does not prohibit a legislator from occupying a position of *public employment* in another department of state government, because a person who occupies a position of *public employment* does not exercise any sovereign functions appertaining to another department of state government.

Based on this construction of the separation-of-powers provision, if a legislator holds another position in state government, the deciding issue under the Nevada Constitution is whether the other position is a *public office* or a position of *public employment*. If the other position is a *public office*, then the legislator would be prohibited by the separation-of-powers provision from holding the *public office*. However, if the other position is merely a position of *public employment*, then the legislator would not be prohibited by the separation-of-powers provision from holding the position of *public employment*.

As discussed previously, the Nevada Supreme Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark Cnty., 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). As recently as 2013, the court reaffirmed that "as is clear from our jurisprudence, officers are fundamentally different from employees." City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 361 (2013). In one of its more recent cases on the issue, the court restated the two fundamental principles that distinguish a public officer from a public employee. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 200-06 (2001) (holding that, for the purposes of the Open Meeting Law, the position of community college president is not a public office).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. Id. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Id. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark Cnty., 89 Nev. 308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. We believe that these fundamental principles are best illustrated by the cases of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), and Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195 (2001).

In Mathews, the defendant accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. 70 Nev. at 120. The Attorney General brought an original action in quo warranto in the Nevada Supreme Court to oust the defendant from that position because when the defendant accepted his position in the executive branch he was also serving as a State Senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before the court could determine the constitutional issue, the court needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant's position in the executive branch was a public office, the issue before the court was whether the position of Director of the Drivers License Division was a public office or a position of public employment. Id. The court held that the Director's position was a position of public employment, not a public office, and thus the court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the Director's position was a position of public employment, the court reviewed the statutes controlling the state department under which the Drivers License Division operated. Id. at 122. The court found that the position of Director of the Drivers License Division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, the court stated:

> Nowhere in either act is any reference made to the "drivers license division" of the department or to a director thereof. Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

Id. at 122-23.

In DR Partners, the court was asked to determine whether the position of community college president was a public office for the purposes of the Open Meeting Law, which is codified in chapter 241 of NRS. Although the Open Meeting Law does not define the term "public office" or "public officer," the court found that the definition of "public officer" in chapter 281 of NRS was applicable because "[t]he Legislature's statutory definition of a 'public officer' incorporates the fundamental criteria we applied in Mathews and Kendall, and is in harmony with those cases, as we subsequently confirmed in Mullen v. Clark County." 117 Nev. at 201.

When the court applied the fundamental criteria from Mathews and Kendall and the statutory definition from chapter 281 of NRS to the position of community college president, the court concluded that the position of community college president was not a public office. DR Partners, 117 Nev. at 202-06. In reaching this conclusion, the court first found that the position of community college president is not created by the Nevada Constitution or statute, but is created by administrative authority and discretion of the Board of Regents. Id. Second, the court found that a community college president does not exercise any of the sovereign functions of the state. Id. Instead, a community college president is wholly subordinate to the Board of Regents and simply implements policies made by higher-ranking state officials. Id. As explained by the court:

> The community college president holds an important position, but the sovereign functions of higher education repose in the Board of Regents, and to a lesser degree in the chancellor, and not at all in the community college president.

* * *

> Because the president is wholly subordinate and responsible to the Board, and can only implement policies established by the Board, we conclude that the community college president does not meet the statutory requisites of a public officer set forth in NRS 281.005(1)(b).

Id. at 205-06.

Based on the foregoing discussion, it is the opinion of LCB Legal that state executive branch employees are not *public officers* because they do not exercise any sovereign functions appertaining to the executive branch of state government. As a result, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* as state executive branch employees because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch.

V. Interpretation of Nevada's separation-of-powers provision with regard to local government employees.

Nevada's separation-of-powers provision provides that "[t]he powers of the Government of the *State* of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial." Nev. Const. art. 3, § 1 (emphasis added). By using the term "State" in the separation-of-powers provision, the Framers of the Nevada Constitution expressed a clear intent to have the provision apply only to the three departments of state government. As explained by the Ohio Supreme Court:

> [I]n general at least, when the constitution speaks of the "State," the whole State, in her political capacity, *and not her subdivisions*, is intended. That such is the natural import of the language used, no one denies. That such must be its construction, to make the constitution consistent with itself, and sensible, is very apparent.

Cass v. Dillon, 2 Ohio St. 607, 616 (1853) (emphasis added).

The Nevada Supreme Court has recently stated that "the language of the separation-of-powers provision in the Constitution does not extend any protection to political subdivisions." City of Fernley v. State Dep't of Tax'n, 132 Nev. 32, 43 n.6 (2016). This determination is consistent with prior cases in which the court has recognized that political subdivisions are not part of one of the three departments of state government. See Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203-04 (2001) ("Neither state-owned institutions, nor state departments, nor public corporations are synonymous with political subdivisions of the state."); Nunez v. City of N. Las Vegas, 116 Nev. 535, 540 (2000) ("Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments. . . . .[T]hey are not state governmental entities."); City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 362 n.5 (2013)

("While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state.").

Because political subdivisions are not part of one of the three departments of state government, their local officers generally are not considered to be state officers who are subject to the separation-of-powers provision. See State ex rel. Mason v. Bd. of Cnty. Comm'rs, 7 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county commissioners was not limited by the doctrine of separation of powers); Lane v. Second Jud. Dist. Ct., 104 Nev. 427, 437 (1988) (noting that the doctrine of separation of powers was not applicable to the exercise of certain powers by a county's district attorney because he was not a state constitutional officer).

Furthermore, as discussed previously, the Nevada Constitution was modeled on the California Constitution of 1849. State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 761 (2001). Because the provisions of the Nevada Constitution were taken from the California Constitution of 1849, those provisions "may be lawfully presumed to have been taken with the judicial interpretation attached." Mason, 7 Nev. at 397.

In construing the separation-of-powers provision in the California Constitution of 1849, the California Supreme Court held that the separation-of-powers provision did not apply to local governments and their officers and employees. People ex rel. Att'y Gen. v. Provines, 34 Cal. 520, 523-40 (1868). In Provines, the court stated that "[w]e understand the Constitution to have been formed for the purpose of establishing a *State* Government; and we here use the term 'State Government' in contradistinction to local, or to county or municipal governments." Id. at 532. After examining the history and purpose of the separation-of-powers provision, the court concluded that "the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments." Id. at 534. Thus, the court held that the separation-of-powers provision had no application to the functions performed by a person at the local governmental level. Id. at 523-40.

In later cases, the California Supreme Court reaffirmed that under California law, "it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government." Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948). This interpretation of the separation-of-powers doctrine is followed by a majority of other jurisdictions. See, e.g., Poynter v. Walling, 177 A.2d 641, 645 (Del. Super. Ct. 1962); La Guardia v. Smith, 41 N.E.2d 153, 156 (N.Y. 1942); 16 C.J.S. Constitutional Law § 112, at 377 (1984).

Consequently, it is well settled that "a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a 'State.'" United States ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist., 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with authority over a limited area, is a different type of government unit than a state-wide agency

that is part of the organized government of the state itself." Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local subdivisions and boards created by the state may have some connection with one of the departments of the state government as defined by the Constitution, they are not 'departments of state government' within the intent and meaning of the [law]." State v. Coulon, 3 So. 2d 241, 243 (La. 1941). In the face of these basic rules of law, courts have consistently found that cities, counties, school districts and other local governmental entities are not included within one of the three departments of state government. See, e.g., Dermott Special Sch. Dist. v. Johnson, 32 S.W.3d 477, 480-81 (Ark. 2000); Dunbar Elec. Supply, Inc. v. Sch. Bd., 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); Stokes v. Harrison, 115 So. 2d 373, 377-79 (La. 1959); Coulon, 3 So. 2d at 243.

Likewise, in the context of the Eleventh Amendment, federal courts interpreting Nevada law have consistently found that cities, counties, school districts and other local governmental entities in this state are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity in federal court. See, e.g., Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002); Herrera v. Russo, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important because when a federal court determines whether a political subdivision is part of state government for the purposes of the Eleventh Amendment, the federal court makes its determination based on *state* law. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 678-79 (9th Cir. 1991).

After examining state law in Nevada, federal courts have found that the Nevada Gaming Control Board, the Nevada Gaming Commission, the Nevada State Industrial Insurance System, the Nevada Supreme Court and the Nevada Commission on Judicial Discipline are state agencies included within one of the three departments of state government and that these state agencies are entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 877-78 (9th Cir. 2002); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Austin, 939 F.2d at 678-79; O'Connor v. State, 686 F.2d 749, 750 (9th Cir. 1982); Salman v. Nev. Comm'n on Jud. Discipline, 104 F. Supp. 2d 1262, 1267 (D. Nev. 2000). In contrast, after examining state law in Nevada, federal courts have found that cities, counties and school districts in Nevada are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Lincoln County, 133 U.S. at 530; Eason, 303 F.3d at 1144; Herrera, 106 F. Supp. 2d at 1062. Thus, as viewed by federal courts that have interpreted Nevada law, local political subdivisions in this state are not included within one of the three departments of state government.

Accordingly, because local political subdivisions in this state are not included within one of the three departments of state government, their officers and employees also are not part of one of the three departments of state government. Therefore, legislators who hold positions of *public employment* with local governments do not hold such positions within one of the three

departments of state government. Consequently, given that the separation-of-powers provision applies only to the three departments of state government, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because local governments are not part of one of the three departments of state government.

Furthermore, as discussed previously, it is the opinion of LCB Legal that the separation-of-powers provision prohibits legislators from holding only *public offices*, not positions of *public employment*. Thus, even assuming that the separation-of-powers provision applied to local governments, it is the opinion of LCB Legal that the separation-of-powers provision still would not prohibit legislators from holding positions of *public employment* with local governments because persons who hold such positions of *public employment* do not exercise any sovereign functions of state government.

CONCLUSION

It is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. By contrast, it is the opinion of LCB Legal that the separation-of-powers provision prohibits legislators from holding only *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. Finally, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision applies only to the three departments of state government, and local governments and their officers and employees are not part of one of the three departments of state government.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Kevin C. Powers
General Counsel

KCP:dtm
Ref No. 200807100628
File No. OP_Erdoes200807221145

Exhibit D

Ryan A. Hamilton, Esq.
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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. SAMUEL JOSIAH CARUSO #3003640, Defendant(s).	Case No: C-19-345393-1 Dept. No.: V **Reply in Support of Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution**

COMES NOW, the Defendant, SAMUEL JOSIAH CARUSO ("Samuel"), by and through his counsel, Ryan A. Hamilton, Esq., and hereby files his *Reply in Support of Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution*. This Motion is made and based upon all the papers and pleadings on file herein.

DATED this 14th day of December 2020.

HAMILTON LAW

By:_____
RYAN A. HAMILTON, ESQ.

POINTS AND AUTHORITIES

A state legislator who also serves as a prosecutor has both the power to write the law and enforce it. Simultaneously exercising the core functions of two branches of government violates Nevada's separation of powers. Because of this violation, the State lacked constitutional authority to prosecute and detain Samuel and this case must be dismissed. All evidence the State obtained through its unconstitutional prosecution and investigation should be deemed inadmissible fruits of these unlawful uses of power.[1]

The Nevada Supreme Court's separation-of-powers decisions teach that where power is exercised in violation of the separation of powers, such action must cease and dismissal is required.[2] *Del Papa v. Steffen*, 112 Nev. 369, 372, 915 P.2d 245, 247 (Nev. 1996)(holding Supreme Court's order appointing a special master to investigate improper leaks to news media

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[1] The State complains that Samuel has not specified what evidence should be excluded. All evidence the State obtained in violation of the separation of powers should be excluded. This includes any evidence the State gathered or developed after bringing charges against Samuel, or any evidence the State gathered pre-filing at the direction of DA Scheible.

[2] The State mischaracterizes Samuel's motion as one to disqualify DA Scheible. But dismissal, not disqualification, is the appropriate remedy for violation of the separation of powers.

violated separation of powers and was of no legal force); *Comm'n on Ethics v. Hardy,* 125 Nev. 285, 287, 212 P.3d 1098, 1101 (Nev. 2009)(affirming injunction of investigation of legislator that violated separation of powers).

Notably, the Nevada Supreme Court has not held that a Deputy District Attorney is a mere public employee who is incapable of violating the separation of powers. Nor has the Nevada Supreme Court held that only public officers, such as the elected District Attorney, are capable of violating the Separation of Powers. Nothing in the text of Article 3, Section 1 of the Nevada Constitution suggests that the Separation of Powers only applies to public officers.

The State's argument that Deputy DA Scheible's prosecution does not violate the Separation of Powers because she is a mere public employee is unavailing. The State relies principally for this argument on an advisory opinion that lacks the force of law. Compounding the problem, the advisory opinion itself bases much of its advice on a Nevada Supreme Court decision that was not resolved on separation-of-powers grounds, *Heller v. Legislature of State of Nev.,* 120 Nev. 456, 473, 93 P.3d 746, 757 (Nev. 2004)(holding Secretary of State lacked standing to seek mandamus to prevent state government employees from serving in state legislature).

Moreover, the Nevada Supreme Court's 2018 decision in *State v. Second Judicial Dist. Court in & for Cty. of Washoe*, 134 Nev. 783, 784, 432

P.3d 154, 157 (Nev. 2018), undercuts the State's position that only public officers, such as the elected District Attorney, may violate the separation of powers. There, the Supreme Court struck down as violating the separation of powers a statute prohibiting a district court from assigning criminal defendants to the veterans court program "unless the prosecuting attorney stipulates to the assignment." *Id.* The Supreme Court explained that because sentencing decisions are within the power of the judiciary, "… requiring that a prosecutor stipulate to the district court's [sentencing] decision, the effect of [the statute] is to afford an executive veto over a judicial function." *Id.* at 788, 159. "…[A]ny prosecutorial power over the district court's disposition at this stage of the proceedings is offensive to the separation of powers." *Id.*

The Supreme Court in *Cty. of Washoe* did not draw any distinction between the elected District Attorney and other prosecutors such as a Deputy District Attorney. The Supreme Court in *Cty. of Washoe* did not suggest that only the elected District Attorney could violate the separation of powers. Rather, the Supreme Court indicated that any exercise of prosecutorial power was offensive to the separation of powers when it infringed on a district court's sentencing decisions. *Id.*

Further, the Nevada Supreme Court explained that charging decisions are a function of the executive branch. *Id.* at 786, 158 (citing *Stromberg v. Second Judicial Court*, 125 Nev. 1, 2-3, 200 P.3d 509, 510 (Nev. 2009)).

There is no question that individual prosecutors such as Deputy DA Scheible are vested with the power to make charging decisions. Of course, the elected District Attorney does not make charging decisions on each individual case.

All in all, Deputy DA Scheible simultaneously exercises core functions of the executive branch and legislative branch. In her capacity as a senator she is empowered to make the law. As a prosecutor she then enforces the law by deciding whether to bring charges against a particular defendant and what charges to bring. She then takes the ultimate enforcement action of prosecuting a defendant and seeking punishment for violation of the law. Such actions are the essence of executive power.

Because her dual role violates Nevada's separation of powers, the instant prosecution of Samuel lacks constitutional authority. This case must be dismissed as a legal nullity and as violative of Samuel's right to due process. Finally, evidence obtained against Samuel in violation of the separation of powers must be excluded in any future prosecution the State may seek to bring against him.

WHEREFORE, Samuel respectfully requests that this Court order:

1. That all evidence obtained against him in this case be excluded as a remedy for the violation of his constitutional rights;

2. That any evidence obtained in a criminal investigation (before the

filing of the criminal complaint) be excluded to the extent the investigation violated the separation-of-powers clause;

3. That this case be dismissed as a legal nullity because it involves an improper and unconstitutional use of executive power; and

4. For all other just and proper relief.

DATED this 14th day of December 2020.

HAMILTON LAW

By:/s/Ryan A. Hamilton
RYAN A. HAMILTON, ESQ.
Attorney for Defendant

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of HAMILTON LAW, LLC, and that on this 14th day of December, **Reply in Support of Defendant's Motion to Dismiss Case and Exclude Evidence for District Attorney's Violation of the Separation of Powers under the Nevada Constitution** was served via the court's electronic filing system to the following persons:

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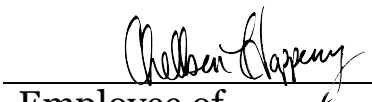

Employee of
Hamilton Law, LLC

Exhibit E

Electronically Filed
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CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER LYNN PLUMLEE,

Appellant(s),

vs.

STATE OF NEVADA,

Respondent(s).

Case No.: C-20-346852-A
Dept. No.: II

Henderson JC Case No.: 18MH0263X
18CRH002333-0000

Hearing Date: October 15, 2020
Hearing Time: 10:00 a.m.

ORDER:
GRANTING APPELLANT'S MOTION TO RECONSIDER, GRANTING THE APPEAL, REVERSING CONVICTION, AND REMANDING TO LOWER COURT

PROCEDURAL HISTORY

This matter came before the Court on a Motion to Reconsider this Court's July 16, 2020 decision, Denying Appellant's Appeal. On February 11, 2020, Appellant filed her Notice of Appeal. After several continuances, and various other logistical issues, a hearing was held on July 9, 2020. This Court issued it ruling, denying the appeal, via Minute Order on July 16, 2020. Appellant timely filed a Motion to Reconsider, whereby she asserted newly discovered facts that Deputy District Attorney Melanie Scheible serves on the Nevada State Legislature, in violation of the Separation of Powers Doctrine[1].

On August 24, 2020, the Court held a Hearing and entertained arguments on Appellant's motion. Given the gravity of Appellant's assertions—and its potential widespread effects on others, like Scheible, who arguably hold dual governmental positions—the Court continued the hearing and allowed the parties an opportunity to provide supplemental briefing on the issue.

[1] This argument was also made by Appellant Molen, in case C-20-348754-A (Molen v. State), who is represented by the same counsel as Ms. Plumlee; with Deputy District Attorney Scheible similarly representing the State. Accordingly, the Court *quasi*-consolidated the cases, solely for the purpose of arguing the Separation of Powers issue.

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

After reviewing all of the submitted papers and pleadings, and considering all of the arguments and authority presented, the Court GRANTS Appellant's Motion to Reconsider, based on the violation of Appellant's Constitutional rights to procedural due process, as explained below.

DISCUSSION

Appellant Jennifer Plumlee was deprived of her Constitutional rights of procedural due process because her prosecutor, Deputy District Attorney Scheible, also served as a Legislator at the time of the trial, in violation of the "Separation of Powers" doctrine – which doctrine exists as a fundamental feature of American government, and as an express clause in the Nevada Constitution. Nev. Const. Art III, §1. An individual may not serve simultaneously as the lawmaker and the law-enforcer of the laws of the State of Nevada.

The plain and unambiguous language of the Nevada Constitution is that:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislative, - the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this Constitution.

Nev. Const. Art III, §1. This is commonly known as the "Separation of Powers" clause.

It is undisputed that Prosecutor Scheible was a person charged with the exercise of powers within the legislative branch of government at the time of the trial. Further, there is no reasonable dispute that, as prosecutor, she was charged with the exercise of powers within the executive branch. The enforcement of the laws of the State of Nevada are powers that fall within the executive branch of the government of the State of Nevada. See Nev. Const. Art. V, §7. Prosecutor Scheible was enforcing the laws of the State of Nevada, and representing the State of Nevada, and thus was exercising the powers delegated to her within the executive branch.

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Deputy District Attorney Scheible did not have the legal authority to prosecute Appellant, thus the trial was a nullity.

The Separation of Powers doctrine historically exists to protect one branch of government from encroaching upon the authority of another. However, more than that, it exists to safeguard the people against tyranny – the tyranny that arises where all authority is vested into one autocrat – a person who writes the law, enforces the law, and punishes for violations of the law.

Our Founding Fathers understood that consolidated power was the genesis of despotism. A dispersion of power, they understood, was the best safeguard of liberty. As explained by James Madison, "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47, ¶3.

One who serves in the legislative branch in making the law must not and cannot simultaneously serve in the executive branch as a prosecutor of the State laws. This Court finds that it is a violation of procedural due process of nearly the highest order for a person to be tried and convicted by a public official who in charge of both writing and enforcing the law.

The authorities cited by the State are very clearly wrong and distinguishable.

In 2004, Attorney General (AG) Brian Sandoval issued an opinion that local executive branch employees are not prohibited from serving in the legislature. However, that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

In August 8, 2020, the Legislative Counsel Bureau issued an opinion that "local governments and their officers and employees are not part of one of the three departments of state government." However, similar to the AG Opinion mentioned above, that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

The State's reliance on Lane v. District Court, 760 P.2d 1245 (Nev. 1988) is misplaced. The issue in Lane was whether the Judiciary was improperly interfering with the functions of the executive branch. The Nevada Supreme Court did not squarely reach the issue whether the due process rights of a criminal defendant were violated when prosecuted by an Assistant District Attorney who also served in the Legislature. Here, this Court is not directing the Office of the District Attorney to do or not to do anything. Rather, this Court is protecting the rights of the accused.

The State attempts to draw a distinction between a "public officer" and a "mere public employee." As to the former, the State acknowledges that the Separation of Powers Doctrine does apply to a person holding an Office established by the Constitution. However, the State invents out of thin air the notion that the Doctrine does not apply to an employee who carries out executive functions. The State's purported authority, State ex rel. Mathews v. Murray, 70 Nev. 116 (1953) does not stand for its proposition. Mathews merely held that a petition for Writ of *Quo Warranto* could not be used to remove a "public employee," – only a "public officer." While there might be a meaningful distinction between a public employee and public officer in some situations, it is not evidence in the words of the Nevada Separation of Powers doctrine.

The State wrongly relies on Heller v. Legislature of the State of Nevada, 120 Nev. 456 (2008) which held that the judiciary could not determine whether a legislator must be removed for violating the "Separation of Powers" doctrine where the legislator also served in the executive Branch. That case was based on lack of standing, rather than the merits. Further, this is not a case of the Judiciary determining the qualifications to be a member of the Legislature, or to work for the District Attorneys' office. Rather this case involves the due process rights of an accused; and, in this case, those rights were violated.

The Appellant was deprived of her constitutional rights to procedural due process even if the Nevada Separation of Powers clause as written does not apply to any persons employed

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

by local governments. The "Separation of Powers" doctrine is such a clear, vital, and well-recognized aspect of the American system of government, existing long before the adoption of the Nevada Constitution.

CONCLUSION

This Court finds that it is fundamental to American jurisprudence that a person who is simultaneously the lawmaker and the law-enforcer of the laws of the State of Nevada shall not prosecute a criminal defendant.

The Court finds that Appellant did not waive her right on appeal to raise the issue of separation of powers. Raising it in the Motion for Reconsideration is the same as raising it in the original appeal brief as the initial appeal is still pending.

Accordingly, the Court hereby **ORDERS, ADJUDGES, AND DECREES** that Appellant's Motion to Reconsider is **GRANTED**.

The Court **FURTHER ORDERS** that Appellant's Appeal is **GRANTED**, the lower court's conviction is **REVERSED**, and the bond, if any, released to Appellant.

The Court **FURTHER ORDERS** that this matter be **REMANDED** to the lower court for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ___ day of November, 2020.

Dated this 18th day of November, 2020

RICHARD F. SCOTTI
DISTRICT COURT JUDGE
D1A 0D9 4066 2CAA
C-20-346852-A
Richard F. Scotti
District Court Judge

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

Craig A. Mueller, Esq.
Attorney(s) for Appellant(s)

Steven B. Wolfson, Esq.
Melanie L. Scheible, Esq.
Alexander G. Chen, Esq.
District Attorney(s)

/s/ *Melody Howard*
_____
Melody Howard
Judicial Executive Assistant
C-20-346852-A

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jennifer Lynn Plumlee, Appellant(s) vs Nevada State of, Respondent(s)	CASE NO: C-20-346852-A DEPT. NO. Department 2

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 11/18/2020

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Exhibit F

DAO

DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER LYNN PLUMLEE,

Appellant(s),

vs.

STATE OF NEVADA,

Respondent(s).

Case No.: C-20-346852-A
Dept. No.: 19

Hend. JC Case No.: 18MH0263X

Hearing Date: December 3, 2020
Hearing Time: Chambers

ORDER DENYING RESPONDENT'S MOTION FOR CLARIFICATION AND STAY OF THE PROCEEDINGS

This matter came before Judge Richard Scotti on a Motion for Clarification and Stay of his prior November 18, 2020 Order Granting Appellant's Motion to Reconsider, Granting the Appeal, Reversing Conviction, and Remanding to Lower Court. Judge Scotti issued his ruling on the matter via Minute Order on December 15, 2020, and Respondent appealed to the Nevada Supreme Court. Subsequently, the Nevada Supreme Court issued its December 31, 2020 Order, directing Respondent to obtain a written Order memorializing Judge Scotti's December 15th ruling. In response, this written Order follows.

On December 15, 2020, Judge Richard Scotti issued the following ruling:

The Court **DENIES** the State's Motion For Clarification And Stay of the Proceedings. This Court finds that Judge Scotti's decision was rendered in complete compliance with the Nevada Code of Judicial Conduct, and without any improper bias or prejudice. The State suggests that the Judge was influenced by a campaign contribution from attorney Craig Mueller. The State is clearly wrong for several reasons. First, the amount of the Mueller contribution represents merely one-half of one percent of the total campaign contributions and loans to the Re-elect Judge Scotti campaign. Second, Judge Scotti had actually made two very significant rulings against other clients of Mr. Mueller even after the receipt of the campaign

Crystal Eller
District Judge

Department Nineteen
Las Vegas, NV 89155

contribution - thus confirming that Judge Scotti renders decision on the merits, rather than external or improper factors. Third, Judge Scotti's decision is legally correct and properly based on the Nevada Constitution and the principle of Separation of Powers. Fourth, Judge Scotti confirms that he acted with impartiality, in strict compliance with the Nevada Code of Judicial Conduct, and without any bias or prejudice. The Nevada Code of Judicial Conduct and the Nevada Supreme Court permit sitting Judges and Judicial candidates to accept campaign contributions from attorneys that have or may have clients with matters pending in their Department - provided it does not lead to actual bias. In fact it is an established practice and commonplace in the Eighth Judicial District Court for Judges and Judicial-candidates to solicit and accept contributions from attorneys that have or might in the future have cases before them. This Court has carefully considered each of the factors set forth in *Ivey v. Eighth Judicial District Court*, 129 Nev. 154, 159 (2013) in exercising its obligation to remain on this case.

Further, the Court **DENIES** the State's request for a stay pursuant to NRAP 8(a). The State is not prejudiced by the denial of a stay, and the denial of a stay will not defeat the object of any appeal.

Dated this 14th day of January, 2021

CRYSTAL ELLER
DISTRICT COURT JUDGE
C-20-346852-A

10B 931 93E1 2742
Crystal Eller
District Court Judge

Crystal Eller
District Judge

Department Nineteen
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jennifer Lynn Plumlee, Appellant(s) vs Nevada State of, Respondent(s)	CASE NO: C-20-346852-A DEPT. NO. Department 19

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